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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-6821

SANTA CLARA PUEBLO, et al, *Petitioners.*

v.

JULIA MARTINEZ, et al, *Respondents,*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

This case raises the following question: Does the Indian Civil Rights Act, 25 U.S.C. §§ 1301-3 (1968), waive all sovereign immunity of Indian Tribes from suit in federal courts and vest federal courts with jurisdiction to determine questions of tribal membership?

The 10th Circuit Court of Appeals has interpreted the Act in such broad fashion as to completely annihilate and destroy the long-standing sovereign immunity of Indian tribes, thus destroying the internal sovereign right of Indian tribes to determine their own membership; a right which has been established and protected by decisions of the Supreme Court of the United States for over one hundred years.

Because of the threat to continued existence of all Indian tribes explicit in the ruling of the Court of Appeals, Santa Clara Pueblo petitions for Writ of Certiorari to review the judgment of the 10th Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Federal District Court for the District of New Mexico is reported as *Martinez* v. *Santa Clara Pueblo,* 405 F.Supp. 7 (D.N.M.1975) and is reproduced in the Appendix to this Petition. pp. 1(a)-27(a). The opinion of the 10th Circuit Court of Appeals No. 75-1615 is reproduced in the Appendix at pp. 28(a)-45(a).

JURISDICTION

The Judgment of the 10th Circuit Court of Appeals was entered on August 16, 1976.

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the Indian Civil Rights Act, 25 U.S.C. §§ 1301-3 (1968) vest federal courts with jurisdiction to determine questions of tribal membership?

2. Does the Act waive the sovereign immunity of Indian tribes to suit in federal courts?

3. Does the Act sub-silentio terminate the quasi-sovereign status of Indian nations as it has been known heretofore?

4. If the Act vests federal courts with jurisdiction to resolve Indian tribal membership questions, what legal standard of equal protection should be applied?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

THE INDIAN CIVIL RIGHTS ACT, 25 U.S.C. §§ 1301-3 (1968) § 1301. *Definitions.*

For purposes of this subchapter, the term—

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and

(3) "Indian court" means any Indian tribal court or court of Indian offense. (Pub.L. 90-284, title II, § 201, Apr. 11, 1968, 82 Stat. 77.)

§ 1302. *Constitutional Rights.*

No Indian tribe in exercising powers of self-government shall—

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

§ 1303. *Habeas Corpus.*

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United

States, to test the legality of his detention by order of an Indian tribe.

(Pub. L. 90-284, title II, § 203, Apr. 11, 1968, 82 Stat. 78.)

THE CONSTITUTION OF THE SANTA CLARA PUEBLO.

Article II—Membership

Section 1. Conditions of membership.—The membership of the Santa Clara pueblo shall consist as follows:

(a) All persons of Indian blood whose names appear on the census roll of the Santa Clara pueblo as of November 1, 1935, provided that within one year from the adoption and approval of this constitution corrections may be made in the said roll by the pueblo council with the approval of the Secretary of the Interior.

(b) All persons born of parents both of whom are members of the Santa Clara pueblo.

(c) All children of mixed marriages between members of the Santa Clara pueblo and nonmembers, provided such children have been recognized and adopted by the council.

(d) All persons naturalized as members of the pueblo.

Section 2. Naturalization.—Indians from other pueblos or reservations who marry a member of Santa Clara pueblo may become members of the pueblo, with the assent of the council, by naturalization. To do this they must (1) go before the pueblo council and renounce allegiance to their tribe and declare intention of becoming members of the Santa Clara pueblo. They shall swear that from that date on they will not receive any benefits from their people, except through inheritance. (2) A year later they shall go before the pueblo council

again, swear allegiance to the pueblo of Santa Clara and receive membership papers; provided, they have kept their promise from the time of their first appearance before the pueblo council.

Article VII—Land

Section 1. Pueblo title.—Title to all lands of the pueblo, whether assigned to the use of individuals or withheld from the common use of the members of the pueblo, shall forever remain in the pueblo itself and not in the individual members thereof. All the members of the pueblo are declared to have an equal right to make beneficial use, in accordance with ordinances of the council, of any land of the pueblo not heretofore or hereafter assigned to individual members.

For the purpose of this article the word "member" shall be defined by the council.

Section 2. Individual rights of possession.—The right of full possession shall be guaranteed to every member of the pueblo, holding lands assigned to him by the Pueblo Council, for cultivation or other purposes: Provided, That no member holding said lands shall sell or will same to an alien. All lands assigned to individuals of the pueblo must be completely fenced within three years. Any violation of the above provision shall be sufficient cause for the council to dispossess him of said land. He shall have the right, however, to rent to a pueblo member or, with the approval of the council, to an alien, all lands under his possession, for a term not to exceed two years. He shall have the right to sell his interest in said lands to any other member of the pueblo after his assignment has been finally approved, subject to such regulations as the council may prescribe.

Section 3. Council to have power of granting assignments.—When any member of the pueblo de-

sires a piece of unimproved pueblo land, he shall select his land, and then make his application for same to the council of the pueblo. If the council decides to grant him the land or any part thereof, they shall mark out the boundaries of same. The grantee shall thereafter have full possession of said land, unless the council shall, in accordance with the constitution, bylaws, and ordinances of the pueblo, dispossess him of the same.

Section 4. Prior assignments recognized.—All assignments of land heretofore made by the pueblo authorities are hereby recognized and confirmed.

THE 1939 ORDINANCE

December 15, 1939

Be it ordained by the Council of the Pueblo of Santa Clara, New Mexico, in regular meeting duly assembled, that hereafter the following rules shall govern the admission to membership to the Santa Clara Pueblo:

1. All children born of marriages between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo.
2. All children born of marriages between male members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo.
3. Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo.
4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances.

STATEMENT OF THE CASE

Proceedings Below

This case involves application of Section 1302(8) of the Indian Civil Rights Act to the Santa Clara Pueblo Tribal Membership Ordinance of 1939. It was alleged by the Plaintiffs that the Ordinance is discriminatory and contrary to said Section of the Act. Suit was filed by Plaintiffs September 22, 1972, in the Federal District Court for the District of New Mexico. The Defendants raised the defenses of lack of jurisdiction, sovereign immunity, failure to exhaust tribal remedies and others. Motions to dismiss were denied by the district court. Trial to the Court without a jury was held on November 25 through 27, 1974. Judgment in favor of the Defendants was entered by the district court on June 25, 1975. The Courts findings and conclusions are contained in its memorandum opinion, App. pp. 1(a)-27(a). Notice of Appeal was filed by Plaintiffs on July 17, 1975. The 10th Circuit Court of Appeals reversed the trial court and remanded the case for further action on August 16, 1976.

Facts

Santa Clara Pueblo is a Pueblo Indian Tribe that has been traced back at least seven hundred years as a distinct cultural group. It has been situated on the banks of the Rio Grande at its present location at least three hundred years. R.pp. 234-235. "Since 1680 the Pueblo has existed as a conquered people, identifiable as a group but surrounded by an alien culture, first Spanish and later American." (Memo. Op. App. p. 19(a).)

Santa Clara Pueblo is an Indian Reservation located in Northern New Mexico with sovereign powers of

self-government over its territories and its people. In 1935 the Pueblo adopted a written Constitution and By-Laws pursuant to the Indian Reorganization Act of 1934. (25 U.S.C. § 476 (1934).)

Plaintiff, Julia Martinez, is a member of the Pueblo, both of her parents having been members. Her husband, Myles Martinez, is a Navajo Indian R.p. 346. The Martinez' have lived at Santa Clara Pueblo since 1941 with the exception of a period when Mr. Martinez was in the military service. The Martinez' have raised ten children on the Pueblo, eight of whom are living. Plaintiff, Audrey Martinez, is the eldest daughter of the Martinez'. All of the Martinez children speak and understand Tewa, the traditional language of the Pueblo. The children were raised at the Pueblo and made it their home except for periods away at school. Memo. Op. App. p. 17(a). These children are presently barred from Pueblo membership by the Ordinance of 1939.

The Martinez children now live on land belonging to their mother, Julia. Julia Martinez is prohibited from conveying or devising her land to any non-member of the Pueblo. Non-members are not allowed to vote in Pueblo elections and they are not allowed to hold office as secular officials of Santa Clara Pueblo. Memo.Op. App. p. 17(a).

The Pueblo holds all of the land within the Pueblo's boundaries in fee simple title in common. Individual members, however, are granted possessory interests in tracts of land which they may pass on to their descendants. The devolution of the possessory interests does not diminish the Pueblo's superior proprietory right. Ct.App.Op. App. p. 31(a).

The denial of tribal membership does not in any way affect the Martinez' entitlement to participate in federal benefits accorded Indians generally. Memo.Op. App. p. 18(a).

All the Martinez children are entitled to full benefits from the Bureau of Indian Affairs regardless of their lack of membership in the Santa Clara Pueblo. The children all have census numbers and are receiving complete medical and educational benefits. R.pp. 25, 61-63. The Martinez children have all the material rights that full members of the Santa Clara Pueblo have. R.p. 64. Even Mr. Martinez, a Navajo, has all the privileges that members have, such as irrigation water, farming, wood-hauling, fishing and hunting. R.p. 15.

Santa Clara Pueblo has consistently taken the position that the 1939 Ordinance is simply a written embodiment of a preexisting unwritten rule of membership that has been in existence from time immemorial. R.pp. 109, 153, 208. Further that the said Ordinance is essential to the cultural and religious heritage that is vital to the Tribes existence. R.p. 117.

Mrs. Julia Martinez was fully aware of the consequences if she married a non-Santa Clara male. R.p. 66. She was told by her uncle that if she married a non-member of Santa Clara Pueblo her children could not be enrolled. The children can be enrolled in the Navajo Nation is desired. R.p. 22.

Julia Martinez has attempted to enroll her children in the Pueblo since 1946. The District Court found that she had exhausted all remedies within the tribal system.

The record fails to show that the Pueblo has varied from the Ordinance under attack. There have been

no exceptions to the Ordinance since its enactment. The District ruled that "the 1939 Ordinance does not violate the restrictions of 25 U.S.C. §§ 1302(8) and Plaintiffs have not been denied the equal protection of the laws within the meaning of the Indian Civil Rights Act." Memo. Op. App. p. 25(a). The District Court's Memorandum Opinion was filed June 25, 1975. On July 17, 1975, the Plaintiffs filed their Notice of Appeal to the 10th Circuit and on August 16, 1976, the 10th Circuit Court of Appeals entered judgment reversing the lower court and remanding the case for further proceedings.

REASONS FOR GRANTING THE WRITS

1. THE SANTA CLARA PUEBLO IS IMMUNE FROM SUIT IN FEDERAL COURTS ABSENT EXPRESS CONGRESSIONAL AUTHORIZATION

In considering this petition, a basic premise concerning tribal government must be considered which is that an Indan tribe recognized by the Federal Government, such as Santa Clara Pueblo, is exempt from direct suit in Federal courts without express Congressional authorization. *United States* v. *United States Fidelity Company,* 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894, (1940); *Twin Cities Chippewa Tribal Council* v. *The Minnesota Chippewa Tribe,* 370 F.2d 529 (8th Cir. 1967); *Iron Crow* v. *Oglala Sioux Tribe,* 213 F.2d 89 (8th Cir. 1956). The sovereign immunity of Indian tribes from suit in Federal Courts cannot be assumed.

The 8th Circuit Court of Appeals in *Thebo* v. *Choctaw Tribe of Indians,* 66 F. 372 (8th Cir. 1895), held that statutory authority necessary to subject a tribe to jurisdiction of the federal courts must be "expressed

in plain and unambiguous terms." The 10th Circuit Court of Appeals has stated that jurisdiction over an Indian tribe in federal court does not exist "unless jurisdiction is *expressly* conferred by Congressional enactment." (Emphasis supplied)—*Native American Church, etc.* v. *Navajo Tribal Council,* 272 F.2d 131 (10th Cir. 1959) at 131. The Civil Rights Act contains no language indicating congressional intent to waive the sovereign immunity of a tribe nor does it specifically grant jurisdiction to bring suit against Indian tribes. The principal that waiver of sovereign immunity must be founded upon express language and cannot be based upon implication has been reaffirmed in recent cases. *United States* v. *King,* 395 U.S. 1 (1969); *Hamilton* v. *Nakai,* 453 F.2d 152 (9th Cir. 1972).

As previously indicated, Congress has never expressly waived sovereign immunity of Indian tribes from suit in federal courts by conferring jurisdiction upon the courts to determine tribal membership questions. The 10th Circuit Court of Appeals did not at any time consider the question of non-waiver of sovereign immunity from suit. However, the Court held that 28 U.S.C. § 1343(4) provides the necessary jurisdictional basis. In doing so the 10th Circuit Court of Appeals has decided a crucial question of federal law which has not been but should be settled by the Supreme Court. The decision in itself conflicts with *United States* v. *United States Fidelity Co., supra; Roff* v. *Burney,* 168 U.S. 218 (1897); *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, (1903), and other decisions of the Supreme Court.

The 10th Circuit ignored completely the admonitions of the Supreme Court in *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164, 172 (1973) that federal

statutes must be read against a backdrop of the doctrine of tribal sovereignty. "It must always be remembered that the various Indian tribes were once independent and sovereign nations and that their claim to sovereignty long predates that of our own Government." 411 U.S. at 172. The court went on to quote from *United States* v. *Kagama,* 118 U.S. 375, 381-2 (1886). "They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union of or the State within whose limits they resided."

2. THERE IS NO PROVISION FOR JURISDICTION IN THE FEDERAL COURT UNDER THE INDIAN CIVIL RIGHTS ACT

Jurisdiction of the Court was sought to be invoked against the Pueblo and its Governor pursuant to Titles 28 U.S.C. §§ 1331(a) and § 1343(4) and 25 U.S.C. §§ 1302-8. The courts below have borrowed jurisdictional authority from other Statutes predating the Indian Civil Rights Act and have borrowed a legal doctrine from civil rights cases to authorize an unlimited and wholly inappropriate scope of relief. Those federal courts that have recognized the problem of sovereign immunity of Indian tribes have overcome this obstacle by concluding that the Indian Civil Rights Act, by implication, sub-silentio abrogated tribal sovereign immunity and constitutes authority by Congress to bring such actions. *Loncassion* v. *Leekity,* 334 F. Supp. 370 (D.N.M. 1971); *Johnson* v. *Lower Elwha*

Tribal Community, 484 F.2d 200 (9th Cir. 1973). If we accept the premise that sovereign immunity cannot be waived by implication these decisions cannot be justified, nor can the decision of the Court of Appeals in this case. This decision is a departure from prior Supreme Court decisions and should be reviewed by the Supreme Court. If sovereign immunity is to be taken from the Indian tribes it must be taken by the legislative branch of the Government and not the judicial branch. The sovereign immunity of Indian tribes from suit cannot and has not been destroyed by implication. Titles 28 U.S.C. §§ 1331 and §§ 1343(4) are wholly insufficient to sustain jurisdiction against Indian tribes under the Indian Civil Rights Act.

3. THE DETERMINATION OF TRIBAL MEMBERSHIP OF THE SANTA CLARA PUEBLO IS AN INTERNAL SOVEREIGN RIGHT OF SANTA CLARA PUEBLO, AND NOT SUBJECT TO CONTROL BY THE FEDERAL COURTS

The most basic and fundamental sovereign right of any Indian tribe is its complete and absolute authority to determine all questions of its own membership as a political entity. *Roff* v. *Burney, supra; Martinez* v. *Southern Ute Tribe of the Southern Ute Reservation,* 249 F.2d 915 (10th Cir. 1957).

The power of an Indian tribe to determine with total authority, all questions of its own membership including the power to revoke rights of membership which it has granted has been recognized by the Supreme Court. *Roff* v. *Burney, supra.* The trial court recognizing the importance to the tribe of having the authority to decide its membership stated; "Membership policies present the same interests on a different level. They are no more or less than a mechanism of social, and to an extent psychological and cultural,

self-definition. The importance of this to Santa Clara or to any other Indian tribe cannot be overstressed. In deciding who is and who is not a member, the Pueblo decides what it is that makes its members unique, what distinguishes a Santa Clara Indian from everyone else in the United States. If its ability to do this is limited or restricted by an external authority, then a new definition of what it is to be a Santa Claran is imposed and the culture of Santa Clara is inevitably changed. Memo. Op. App. p. 20(a).

Federal Courts have never been granted express jurisdiction by Congress to consider tribal membership questions. Accordingly, the Supreme Court held in *Lone Wolf* v. *Hitchcock, supra* at 172. "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the Beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."

It is clear that prior to the passage of the Indian Civil Rights Act, federal courts did not have jurisdiction over Tribal enrollment matters. *Martinez* v. *Ute Tribe, supra.*

Felix S. Cohen in Cohen, Handbook of Federal Indian Law, p. 133, Section 4. (1942) stated:

> "The Courts have consistently recognized that in the absence of express legislation by Congress to the contrary, an Indian tribe has complete authority to determine all questions of its own membership . . . .
>
> The power of an Indian tribe to determine questions of its own membership derives from the character of an Indian tribe as a distinct political entity."

There having been no express Congressional enactment granting federal court jurisdiction over internal tribal matters, prior decisions of the Supreme Court require that the Supreme Court rule on this issue in view of the decision reached by the 10th Circuit Court of Appeals.

4. CONGRESS HAS ACTED IN THIS AREA. BUT HAS FAILED TO EXPRESS ANY INTENT THAT TRIBES NOT DETERMINE THEIR OWN TRIBAL MEMBERSHIP

Admittedly, while the federal courts do not have such authority, Congress has in fact, plenary power to establish laws concerning questions of tribal membership. *Lone Wolf* v. *Hitchcock, supra.* Congress has exercised its plenary authority in this area in a variety of ways. Congress has delegated to the Secretary of the Interior general authority to approve final tribal rolls for purposes of dividing and distributing tribal funds. 25 U.S.C. § 163, § 1300-d-3-4. However, even the broad general power of the Secretary over tribal rolls is not without limitation, as stated by the solicitor of the Department of the Interior in an Opinion dated December 18, 1937: ". . . while the Department may approve or disapprove adoptions into the tribe and expulsion therefrom made by the tribal authorities, no case holds that the Department, in the absence of express statutory authorization, may grant a person tribal membership over the protest of the tribal authorities."

"Whatever may be the exact extent of departmental power in this field, in view of the broad provisions of the Wheeler-Howard Act, it has been administratively held that the Secretary of the Interior may define and confine his power of supervision in accordance with the terms of the Constitution adopted by the tribe itself and approved by him." Cohen, Federal Indian Law at 421.

The Secretary has approved the Constitution and By-Laws of the Santa Clara Pueblo. Article 2, Section 2 of The Santa Clara Pueblo Constitution specifically grants the Council of Santa Clara Pueblo the power to determine which children of mixed marriages should be recognized as members of the Pueblo and it further provides (Article 7, Section 1) that the Council shall determine who is a member for purposes of dealing in land and land use rights. The 1939 Ordinance was enacted by the Council, pursuant to these Constitutional powers.

The Governmental function of an Indian tribe in adopting members is analogous to the naturalization of citizens by the United States. Indeed, the Supreme Court has referred to tribal enrollment as "Indian naturalization." *Cherokee Intermarriage Cases,* 203 U.S. 78 (1906). That description is particularly apt because the absolute discretion of an Indian tribe to determine requirements for enrollment in the tribe is as broad as that of the United States to determine the requirements for naturalization. An alien has no inherent right to naturalization and Congress may refuse or may grant naturalization upon any conditions it may prescribe. "No alien has the slightest right to naturalization unless all statutory requirements are complied with . . . ." *United States* v. *Ginsberg,* 243 U.S. 472 (1917). Indeed during one period in the history of our country a child born outside the continental United States, whose father was a citizen of the United States was granted citizenship but if the mother were a citizen of the United States the child was not granted citizenship. In view of the fact that Congress has acted in the area of tribal membership before, it seems even

clearer that had Congress intended to destroy tribal sovereignty it would have done so in an affirmative fashion and not by implication.

5. THE LEGISLATIVE HISTORY OF THE ACT

Had the 10th Circuit Court of Appeals followed the clear guidance of the Supreme Court it would have ruled that the Indian Civil Rights Act and its legislative history show no indication that Congress intended to waive sovereign immunity of Indian tribes from suit in federal courts. Indeed it shows the opposite that Congress affirmatively intended not to waive tribal sovereign immunity. Congress in order to protect civil rights of members of Indian tribes decided to strengthen tribal governments and tribal institutions. Testimony before the Ervin Committee indicated that Indian tribes lacked certain civil rights protections, many not having constitutions or other formal governments.

Congress established a list of civil right guarantees for Indians and Section 1302 (25 U.S.C. 1302) was intended as a guide to Indian tribes in exercising their governmental powers, a guide to the Secretary of the Interior in exercising its supervisory powers and finally a guide to the federal court in habeas corpus proceedings resulting from tribal detentions.

Congress defined "powers of self-government" (25 U.S.C. § 1301(1)) as including all executive, legislative, and judicial powers of all Indian tribes and agencies. Admittedly, all actions of tribal government, whether executive or legislative, are governed by 25 U.S.C. § 1302, and the very act of lending federal sanction to the enumeration of civil rights by Congress is designed to make it clear to Indian tribes that they are no longer free to act without specific restraints.

In 25 U.S.C. § 1301(3), "Indian Court" is defined to include Indian tribal court or courts of Indian offense. Thus, Congress makes clear that all judicial functions of tribal courts, whether criminal or civil, are to be governed by the specific restraints of 25 U.S.C. § 1302.

Section 1303 of the Act is the only section which vests jurisdiction in the federal courts, and it is limited to testing the legality of tribal detention orders. After rejecting earlier drafts of the Act which would have provided de novo review of all criminal actions of tribal courts, Congress nevertheless felt that deprivation of personal liberty was of sufficient importance to require the carving out of an additional page of jurisdiction in federal courts. But even here, Congress did not waive sovereign immunity of *Indian tribes* from suit in federal courts; habeas corpus proceedings are actions directed only at officials who have custody of convicted criminal defendants. (Emphasis Added) This section does not authorize actions against Indian tribes themselves but provides only a mechanism to prevent illegal detention of criminal defendants.

The legislative history of the Act supports petitioner's position. In none of the hearings held upon the Act from 1961 through 1965 was there one word intimating that the Act would waive tribal sovereign immunity, or would vest the federal courts with jurisdiction over questions of tribal membership. *The Indian Bill of Rights and the Constitutional Status of Tribal Governments,* 82 Harv.L.Rev. 1343, 1359; *Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 87th Cong., 1st Sess., Part 1 (1961), 87th Cong. 1st Sess., Part 2 (1961), 87th Cong., 2d Sess., Part 3 (1962), 88th Cong., 1st Sess., Part 4 (1963); *The Staff of Subcommittee on*

Constitutional Rights of Senate Committee on the Judiciary, 88th Cong., 2d Sess. (Committee 1964) *Hearings on S.J. Res. 40 to Protect the Constitutional Rights of the American Indian, Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 89th Cong., 1st Sess. (1965); *Constitutional Rights of the American Indian, Staff of Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 89th Cong., 2d Sess. (Committee 1966); *Hearings on Rights of Members of Indian Tribes before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs,* 90th Cong., 2d Sess. (1968).

Frank J. Berry, Solicitor of the Department of the Interior recognized that:

> On the other hand, the people of Indian Tribes have their roots in an entirely different culture and it may be that the devices which appropriately protected the interests of the Anglo-American of the late 18th Century may not be appropriate to protect the Indian tribal member of the middle 20th Century. *Hearings on S.961-68 and S.J. Res. 40 to Protect the Constitutional Rights of American Indians before the Subcommittee on Constitutional rights of the Senate Committee on the Judiciary,* 89th Cong., 1st Sess. (1965) p. 17.

Senator Ervin himself expressed Congress' concern for protecting Indian self-government and cultural values by stating:

> The essential problem that confronts the Congress in this field is whether or not it is possible to establish a relationship with our other levels of government for the reservation Indians in a way that will harmonize with our levels of government and yet at the same time preserve for them such

necessary local self-government as would seem to best serve their interest. *Hearings on S.J.Res. 53 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 87th Cong., 1st Sess., Part 1 (1961) p. 19.

Congress did not intend that 25 U.S.C. § 1302 allow invasion by the federal courts into the areas of the essential political structure of Indian tribes. The Act incorporates only selected portions from the federal bill of rights contained in the first ten amendments, and subsection (8) contains an edited version of the language of the 14th Amendment. Nowhere are privileges and immunities of citizens mentioned, nor is any mention made in the Act of the right to vote.

Since determination of membership is an essential political attribute of an Indian tribe, 25 U.S.C. § 1302 should not be construed to have taken that right from the Indian tribes by implication and to have conferred it upon the federal courts.

Returning to the question of federal court jurisdiction generally, one notes that S.962, the earlier version of 25 U.S.C. § 1303, vested the federal district courts with jurisdiction to hear all criminal convictions in tribal courts de novo by a judge and a jury. But these provisions were removed and federal courts were vested with only limited jurisdiction over habeas corpus proceedings. Again Senator Ervin himself recognized this limited effect of the Act in the hearing of April 11, 1969, regarding portions of the proposed S.211 which restated 25 U.S.C. § 1303:

> Senator Ervin. This bill does not provide for the Federal courts to review all the decisions of the Indian courts. In fact, provision for Federal review was in there originally, and at the request of a number of tribes we eliminated that entirely. *The only provision in this bill that provides for Federal court interference is writ of habeas corpus,* and that probably exists as law now, although I am not quite certain. If the man was convicted in violation of a law, the Federal Court would have the jurisdiction to issue a writ of habeas corpus. *Hearing on Title II of the Civil Rights Act of 1968 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 91st Cong., 1st Sess. (1969) p. 15 (Emphasis supplied)

The doctrine of sovereign immunity of Indian tribes is of such long standing and so well known that Congress must have been well aware of it. Yet Congress refrained from any declaration waiving immunity for the purposes of the Indian Civil Rights Act of 1968. When the entire Act is viewed against a backdrop of tribal sovereignty, it becomes completely clear that Congress chose in the Act to proceed in a limited fashion by strengthening tribal governments, encouraging tribal self-determination and yet at the same time preserving the civil rights of tribal members. Congress acted knowing full well that it retained plenary jurisdiction over Indian tribes and that if tribal courts in civil and criminal matters, tribal councils in executive and legislative matters failed to protect the civil rights of tribal members, then Congress could take the more drastic step of vesting the federal courts with additional jurisdiction.

Until Congress takes such additional steps, it is wholly unwarranted for the federal courts to conclude that Congress has sub-silentio waived tribal sovereign immunity. It is especially dangerous to the continued existence of tribal governments for federal courts fo attempt to read 25 U.S.C. § 1302 in conjunction with

28 U.S.C. § 1343(4) in such manner as to throw open the floodgates of litigation against Indian tribal governments. Yet this is exactly what the 10th Circuit Court of Appeals has done.

Most Indian tribes are able to continue functioning as sovereign units of government only because they are able to conserve assets and obtain federal grants for improving and enlarging their governmental functions. Their traditional sovereign immunity from suit in federal courts has protected them from suits which would literally destroy them. To allow the Court of Appeals' decision to stand striking down tribal sovereign immunity is unthinkable in light of the intent of Congress in enacting the Indian Civil Rights Act.

In keeping with the rule that tribal sovereign immunity is not likely to be considered abrogated, this legislative history, especially Senator Ervin's statement of his understanding that 25 U.S.C. § 1303 is the only provision in the Act "that provides for federal court interference," appears to be conclusive of Congress' intent.

6. THE DEVELOPMENT OF CASE LAW UNDER THE ACT

There are 10 sub-paragraphs in 25 U.S.C. § 1302. All but sub-paragraph (8) apply to "any person." Sub-paragraph 8 is limited to "any person within its (tribes) jurisdiction." The tribes jurisdiction is limited to Indians on the Reservation, however, enrollment ordinances potentially apply to eligible members, whether on or off the reservation. Had Congress intended to subject the tribes power to fix membership standards to the equal protection clause, Congress certainly would not have limited the clause to Indians living on the Reservation, the only Indians within the

tribes jurisdiction. This is further proof that sub-paragraph 8 was intended to protect the civil rights of Indians only in the context of the application of criminal justice.

An early 10th Circuit case indicated that the same restraints and restrictions contained in the equal protection clause of the United States Constitution were not to be imposed on Indian tribes pursuant to the Act. *Groundhog* v. *Keeler,* 442 F.2d 674 (10th Cir. 1971).

The 10th Circuit in *Slattery* v. *Arapahoe Tribal Council,* 453 F.2d 278 (10th Cir. 1971), held that the Indian Civil Rights Act was concerned primarily with tribal administration of justice, and the imposition of tribal penalties and forfeitures, and not with the specifics of tribal structure of office holding. Again the 10th Circuit in *McCurdy* v. *Steele,* 353 F.Supp. 629 (D-Utah 1973), rev'd, 506 F.2d 654 (10th Cir. 1974) stated that "Its (the ICRA) guarantees of individual rights should, where possible, be harmonized with tribal cultural and governmental autonomy." p. 633

The Court of Appeals in the case at bar recognized that "the Congressional hearings gave little attention to Constitutional rights other than protection under the criminal law and procedure of individuals in the tribal courts." App. page 37(a). The Court further recognized that before enactment the Act was amended and provisions requiring restraints on blood requirements for membership were rejected as were first amendment, non-establishment clause provisions which would endanger the continued existence of Pueblo theocracies. App. Page 37(a). The Court acknowledged that the deletion of the non-establishment clause in the 15th

Amendment appears to have been in deference to the traditional Indian culture.

All of the opinions to date have paid lip service to the theory of tribal sovereignty. Yet all have glossed over this issue summarily and found that Congress has silently overruled an entire line of cases beginning with *Worcestor* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832).

7. THE EQUAL PROTECTION CLAUSE OF THE INDIAN CIVIL RIGHTS ACT DOES NOT INCORPORATE THE STANDARDS OF THE EQUAL PROTECTION CLAUSE OF THE 14th AMENDMENT AND THE 14th AMENDMENT STANDARDS ARE NOT APPLICABLE TO TRIBAL MEMBERSHIP QUESTIONS

If the federal courts are to take jurisdiction of matters involving tribal membership, then we must ask ourselves what standard is to be applied and what meaning is to be given to the equal protection clause of the Indian Civil Rights Act. The following language expresses petitioners' feelings as to the proper approach to this question.

> So long as the courts continue to operate on the belief that they have jurisdiction to review all facets of Indian tribal government under the Indian Civil Rights Act, it will be necessary for federal judges to develop an understanding of the unique factors which characterize the life of Indian political communities. In the observation of this writer, the most important issues in the mind of Indian people today are tribal autonomy and Indian separatism. The two are intertwined. Often the issue is phrased in terms of "tribal sovereignty:" other times, one hears of the "right to be Indian" . . . Courts should be cognizant of: (7) The tribes' inherent right to determine their own membership must be understood as vital to the survival of these people, and the broadest recognition must be given to the tribes' determination.

> . . . Above all, courts must avoid the unconscious tendency to bring missionary zeal to the task of extending the blessings of our philosophy of individual liberties to Indian tribes and tribal members. *Ziontz, In Defense of Tribal Sovereignty-20,* South Dakota, L.R. 1, 47-48 (1975).

Beginning with *Worcestor* v. *Georgia, supra,* federal courts have adopted a federal judicial doctrine exempting tribal governments from any constitutional restraint in the exercise of power over tribal members. Indian tribes have been recognized as "dependent sovereign nations" with certain attributes of sovereignty which include the power of regulating their internal and social relations. Neither the "Bill of Rights" nor the 14th Amendment are applicable to Indian tribes. *Talton* v. *Mayes,* 163 U.S. 376 (1896); *Native American Church* v. *Navajo Tribal Council, supra.*

In analyzing the Civil Rights Act courts have uniformly held that the equal protection clause of the Act is not subject to the same standard as the Constitutional guarantee of equal protection. *Groundhog* v. *Keeler, supra* and *Lohnes* v. *Cloud,* 366 F.Supp. 619 (D.N.D. 1973).

The Court of Appeals in this case recognized that in an evaluation such as the present one, "the cultural autonomy and integrity of the tribes were entitled to be weighed. . . . At the same time nothing resembling a formula for determining which of these conflicting interests is to prevail has been furnished." App. page 39(a). The court went on to state that the scope, extent and importance of the tribal interest is to be taken into account and that the individual right to fair treatment under the law was likewise to be weighed against the tribal interest.

The Court of Appeals apparently recognized the fact that Congress did not intend to subject a tribe to those requirements which are exacted under the equal protection clauses of the 14th and 15th Amendments to the Constitution of the United States. The court stated that "The Fourteenth Amendment standards do not, however, apply with full force" App. page 42(a), but did not enunciate clear principles or guidelines stating what test is to be applied in cases of this type.

The Court went on to say "But we must still ask: "Is the Tribe justified in deviating from the Fourteenth Amendment standard on the basis that tribal, cultural and ethnic survival would suffer from full-scale enforcement of subsection (8) to these facts? We must hold that the facts do not support the decision that the tribe's interest is compelling." It clearly appears that the Court after stating that the 14th Amendment standards do not apply, proceeds to apply exactly those standards. The court proceeds to discuss the matter under 14th Amendment standards and not something with less than "full force."

The Eighth Circuit in *Daly* v. *United States,* 483 F.2d 700 (8th Cir. 1973) has shed some light on the question of what standard applies holding that the one man, one vote rule applies to tribal elections. The Court citing *White Eagle* v. *One Feather,* 478 F.2d 1311 (8th Cir. 1973), stated: "In *One Feather* we held that where a tribe has adopted election procedures analogous to those found in Anglo-American culture, the equal protection clause of the Indian Civil Rights Act required that the election procedures comply with the one-man, one-vote principle established in *Baker* v. *Carr* (citation), and its progeny." pp. 704-705. The court then examined the election procedures of the

Crow Creek Tribe and held that since they were substantially Anglo-American in form, they should be controlled by Anglo-American standards. If the procedure is not in effect parallel to the Anglo-American system, then the standard would not be the same.

The court in *Daly, supra,* went on to uphold a blood quantum requirement involving the Crow Tribe. The Tribe required one-quarter blood or more, for enrollment as a tribal member, but required one-half blood or more for eligibility to be Chairman of the Council. This had been challenged as a denial of Equal Protection. The court stated:

> In the instant case, we also are convinced that the Tribe has sufficient cultural interest in setting a higher blood quantum requirement to hold office than for mere membership in the Tribe if it so desires. However, once the requirements are established, *they must be applied uniformly to avoid violating 25 U.S.C. § 1302(8),* pp. 705 & 706. (Emphasis added)

More recently in *Wounded Head* v. *Tribal Council of the Oglala Sioux Tribe,* 507 F.2d 1079 (8th Cir. 1975), the Court held that the "equal protection" clause of the Indian Civil Rights Act must be viewed in the context of tribal government and cultural background and was not the same as the "equal protection" clause of the Fourteenth Amendment. *See also, Means* v. *Wilson,* 522 F.2d 833 (8th Cir. 1925); *Howlett* v. *The Salish & Kootenai Tribes,* 529 F.2d 233 (9th Cir. 1976).

While no court had previously been called upon to answer this exact issue, there is authority as held by the trial court that a minimum requirement is that existing tribal law be applied with an even hand. App. page 24(a); *Daly, supra; Yellow Bird* v. *Oglala Sioux*

Tribe of South Dakota, 380 F.Supp. 438 (D.S.D. 1974). Uniform application of tribal laws is all that is required by the Civil Rights Act. It is undisputed that the Santa Clara enrollment rule was applied uniformly to all and that there has been no exception to the rule since it was codified in 1939. So long as there are no exceptions and identical rules and laws are applied to all members with either an even hand, or in a fair manner, then such action is within the safeguard intended and proper.

Though the proper test is that set out above, the enrollment rule of the Santa Clara Pueblo meets the stricter requirements of the Constitutional Equal Protection standard as the test has been construed in recent cases. The inquiry under this test is the legitimate state interest the classification promotes balanced against the fundamental personal right the classification might endanger. The Supreme Court has required that a statutory classification bear some rational relationship to a legitimate state purpose. *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972); *Morey* v. *Doud,* 354 U.S. 457 (1957); *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966).

The Governor of Santa Clara Pueblo, when asked the probable effect of not enforcing the 1939 Ordinance testified that:

> It would tend to destroy the Pueblo as a whole. . . . Without it we would have an influx of people that we don't know who they are. They would come in from all directions; Indians and non-Indians alike. So it would be a destruction on the Santa Clara Indian culture. R. p. 117.

In response to a similar question, Dr. Florence Hawley Ellis, a retired Professor of Anthropology and a

leading expert on New Mexico Pueblo Indians (R.pp. 227-232) testified as follows:

> Well, because of the importance of men in connection with the carrying on of the culture, the training of the children in the socio-religious situation, *the culture eventually would break down and be lost.* R. p. 251 (emphasis added).

It is clear therefore that even under the stricter standard the Pueblo must prevail. In both the opinion of the expert witness and that of the Governor of the Pueblo, altering the present rule would be tantamount to destroying the very tribe the Martinez would be members of. This surely was not intended by Congress. The Martinez have made it clear they do not desire this result. App. page 25(a).

The recent Supreme Court decision in *Morton* v. *Mancari,* 417 U.S. 535 (1974), sheds further light on the special and unique legal status of Indian tribes. The lower court, a three judge district court, ruled that the "Indian Preference Act" was repealed, and included dicta indicating the Act was unconstitutional. The Supreme Court in reversing made the following observations:

> Resolution of the instant issue turns on the unique legal status of Indian Tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a "guardian-ward" status, to legislate on behalf of federally recognized Indian tribes. . . . Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. p. 551.

> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process. p. 555.

This case acknowledges the special legal status of Indians and Indian Tribes. Had the case involved non-Indians it seems fairly clear that the Act would have been held unconstitutional. However, the preference was "reasonable and rationally designed to further Indian self-government" . . . and thus sustained.

The Court of Appeals found that the enrollment rule is strictly the result of economics. This finding is inconsistent with the facts and simply answered by showing that the group of people in the class represented by Audrey Martinez has never been asked to leave the Pueblo, notwithstanding the fact that there are some one hundred people in that category, or almost ten percent of the entire population. Memo. Op. p. 3. Also of relevance is the fact that illegitimate children born to a Santa Clara tribal member woman are granted full rights and cared for by the Pueblo. R. p. 145.

The trial court was imminently correct in its holding that:

> the equal protection guarantee of the Indian Civil Rights Act should not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival and therefore should be preserved and which of them are inimical to cultural survival and should be made by the people of Santa Clara; not only because they can best decide what values are important, but also because they

> must live with the decision every day. Obviously they can and should be the judges of whether a particular rule is beneficial or inimical to their survival as a distinct cultural group. App. p. 26(a).

The trial court after hearing evidence, observing the witnesses and being close to the facts and people involved concluded that:

> Much has been written about tribal sovereignty. If those words have any meaning at all, they must mean that a tribe can make and enforce its decisions without regard to whether an external authority considers those decisions wise. To abrogate tribal decisions, particularly in the delicate area of membership, for whatever 'good' reasons, is to destroy cultural identity under the guise of saving it. Congress has not indicated that they intended the Indian Civil Rights Act to be interpreted in such a manner. p. 26(a).

The decision in this case has a far reaching affect not only on Santa Clara Pueblo, but on all sovereign Indian Tribes in the United States. This decision may very well be the difference between survival or destruction of American Indian Tribes as they now exist, and is therefore a question that should be settled by the Supreme Court of the United States.

CONCLUSION

For the reasons stated, Petitioner respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the 10th Circuit in Martinez v. Santa Clara Pueblo No. 75-1615 (1976).

Respectfully submitted,

PRELO & GRODNER
Attorneys for Petitioners

By
MARC PRELO

November, 1976

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 9717 Civil

JULIA MARTINEZ, et al, *Plaintiffs*,

v.

SANTA CLARA PUEBLO, et al, *Defendants*.

(FILED JUNE 25, 1975)

Supplemental Memorandum Opinion on Jurisdiction

Plaintiffs, Julia Martinez and her daughter, Audrey Martinez, bring this suit, each individually and as the representative of a class, against the Santa Clara Pueblo and Governor Lucario Padilla, individually and in his capacity as governor of the Pueblo.[1] Plaintiffs seek a declaratory judgment that a portion of a tribal ordinance which denies Pueblo membership to the children of women (but not men) who marry non-members of the Pueblo violates 25 U.S.C. § 1302(8). This statute prohibits a tribal government in the exercise of its power of self-government from denying "to any person within its jurisdiction the equal protection of its laws or depriv(ing) any person of liberty or property without due process of law." Plaintiffs seek an injunction against the further enforcement of the ordinance.

The Ordinance of 1939 reads as follows:

> Be it ordained by the Council of the Pueblo of Santa Clara, New Mexico, in regular meeting duly assembled,

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[1] At time of Trial, Paul Tafoya was the duly elected governor of the Pueblo and was sued individually and in his official capacity. Lucario Padilla was elected governor sometime after the case was tried, and has been substituted as a defendant, pursuant to F.R.C.P. 25(d).

that hereafter the following rules shall govern the admission to membership to the Santa Clara Pueblo:

1. All children born of marriages between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo.
2. All children born of marriages between male members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo.
3. Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo.
4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances.

Plaintiffs attack subparts two and three of the ordinance only.

Jurisdiction was alleged to be conferred by 25 U.S.C. § 1302 (8) and 28 U.S.C. § 1343 (4). Defendants vigorously contest the question of jurisdiction. The following memorandum is filed at this time concerning the conclusion of law that jurisdiction over this action exists.

Plaintiff Julia Martinez is a female member of the Santa Clara Pueblo who is married to a non-member, Myles Martinez, a Navajo Indian. Plaintiff Audrey Martinez is one of eight surviving children of the marriage. Audrey and the other Martinez children have been denied membership in the Pueblo pursuant to the 1939 Ordinance because their father is not a member of the Pueblo. Defendant Santa Clara Pueblo is an Indian Tribe which was reorganized and adopted a constitution under the authority of 25 U.S.C. § 476. Defendant Lucario Padilla is the duly elected Governor of the Pueblo, charged by the law of Santa Clara

(Santa Clara Constitution, Article V; Santa Clara By-Laws, Article 1, Section 1) with enforcing the laws of the Pueblo, "civil and criminal, written and unwritten."

Prior to trial, defendants twice moved to dismiss this case for lack of subject matter jurisdiction. On the first motion to dismiss, defendants contended that federal courts lack jurisdiction over intertribal controversies, particularly those involving membership disputes, on the authority of *Martinez v. Southern Ute Tribe,* 249 F.2d 915 (10th Cir. 1957), cert. den. 356 U.S. 960, 78 S.Ct. 998, 2 L.Ed.2d 1067, reh. den., 357 U.S. 924, 78 S.Ct. 1374, 2 L.Ed.2d 1376, and similar cases. The motion was denied at that time.

Martinez, supra, and its progeny decided before the enactment of the Indian Civil Rights Act, 25 U.S.C. § 1301 et seq., held only that intra-tribal controversies, among them membership disputes, did not "arise under" the Constitution, laws or treaties of the United States, as they existed prior to the Indian Civil Rights Act, and that therefore 28 U.S.C. § 1331 did not confer subject matter jurisdiction on a federal district court to hear such a case. Since the enactment of the Indian Civil Rights Act, several courts have held that jurisdiction is conferred by virtue of the Act and 28 U.S.C. § 1331. *Dodge v. Nakai,* 298 F.Supp. 17, 25 (D. Ariz. 1968); *Loncassion v. Leekity,* 334 F.Supp. 370 (D. N.M. 1971); *Contra, Cornelius v. Moxon,* 301 F.Supp. 783 (D.N.D. 1969). See also *Colliflower v. Garland,* 342 F.2d 369 (9th Cir. 1965; *Settler v. Yakima Tribal Council,* 419 F.2d 486 (9th Cir. 1969), cert. den. 398 U.S. 903 (1970) (holding jurisdiction under 28 U.S.C. § 1331 on the basis of the law as it existed prior to the enactment of the Indian Civil Rights Act). Thus, *Martinez* and its progeny are not on point as to the jurisdictional question presented.

While the Tenth Circuit has not decided whether 25 U.S.C. § 1302(8) and 28 U.S.C. § 1343(4) confer jurisdiction over cases such as this, other courts which have considered this question have almost uniformly held in favor

of jurisdiction. *Crowe v. Eastern Band of Cherokee Indians,* 506 F.2d 1231 (4th Cir. 1974); *Laramie v. Nicholson,* 487 F.2d 315 (9th Cir. 1973) cert. den. 419 U.S. 871 (1974); *Johnson v. Lower Elwha Tribal Community,* 484 F.2d 200 (9th Cir. 1973); *White Eagle v. One Feather,* 478 F.2d 1311 (8th Cir. 1973); *Daly v. United States,* 483 F.2d 700 (8th Cir. 1973); *Brown v. United States,* 486 F.2d 658 (8th Cir. 1973); *Luxon v. Rosebud Sioux Tribe of South Dakota,* 455 F.2d 698 (8th Cir. 1972); *Seneca Constitutional Rights Organization v. George,* 348 F.Supp. 48 (W.D.N.Y. 1972); *Solomon v. La Rose,* 335 F.Supp. 715 (D.Neb. 1971); *Spotted Eagle v. Blackfeet Tribe,* 301 F.Supp. 85 (D.Mont. 1969). See also *Dodge v. Nakai,* supra, (where jurisdiction appears to have been upheld alternatively under 28 U.S.C. § 1331 or 28 U.S.C. § 1343(4) and 25 U.S.C. § 1302(8)). *Contra Yellow Bird v. Oglala Sioux Tribe,* 380 F.Supp. 438 (D.S.D. 1974); *Lefthand v. Crow Tribal Council,* 329 F. Supp. 728 (D.Mont. 1971). In addition, these cases, either by implication or expressly, have held that the Indian Civil Rights Act abrogates a tribe's sovereign immunity for purposes of suit under the Act. See also *Loncassion v. Leekity,* supra.

Several of these cases are closely on point. In *Laramie,* supra, plaintiffs were children alleging a membership ordinance was being applied in a discriminatory manner, in violation of the equal protection clause of the Indian Civil Rights Act. The Ninth Circuit upheld jurisdiction, almost without discussion, on the basis of its earlier decision in *Johnson v. Lower Elwha Tribal Community,* supra, noting that while *Johnson* involved the due process clause of 25 U.S.C. § 1306(8) in the context of revocation of a lease of tribal lands, "we see no difference in principle that distinguishes our *Johnson* case from this case." 487 F.2d 315, 316.

The case of *Yellow Bird v. Oglala Sioux Tribe,* supra, also involved an equal protection challenge to a tribal membership provision. In that case, however, the trial court granted defendants' motion to dismiss, holding that it lacked subject matter jurisdiction over the case. In Yellow Bird, plaintiffs sought to run in the Oglala primary election, apparently for positions as candidates for the tribal council. The Oglala Sioux Tribal election board refused to place their names on the ballot, apparently on the grounds that plaintiffs were barred from membership in the tribe by a tribal constitutional provision which restricted membership to those children born to a member of the tribe who was a resident of the reservation at the time of the birth of the child. The trial court based its decision on the language of the leading Eighth Circuit case on jurisdiction under the Indian Civil Rights Act, *Luxon v. Rosebud Sioux Tribe of South Dakota,* 455 F.2d 698 (8th Cir. 1972) that "[I]n our opinion, 28 U.S.C. § 1343(4) gives the district court jurisdiction to determine, in a proper case, whether an Indian Tribe has denied to one of its members any of the rights given to members under the Indian Bill of Rights." *Id.* at 700.

The court cast the question as one of interpretation of the Act to determine whether the equal protection guarantee of § 1302(8) of the Act extended to the situation presented, and after an examination of relevant Eighth Circuit decisions, held that it did not. The court concluded its opinion by noting that its decision was not in conflict with *Laramie,* supra, because *Laramie* involved discriminatory application of an ordinance, which plaintiffs in *Yellow Bird* had not alleged.[2]

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[2] The Court noted that there was no allegation that plaintiffs had ever applied to the Tribal Council to be enrolled as members, and commented: "The Tribal Council is the constitutionally proper body for determining membership qualifications." *Yellow Bird,* 380 F.Supp 438 at 440 (D.S.D. 1974). In the context of the opinion, this does not appear to have been decisive for the trial court and the case is discussed as though it is not. However, to the extent this fact raises the issues of justiciability or exhaustion, those issues will be discussed below.

The Court in *Yellow Bird* seems to give *Luxon* a more narrow interpretation than the case warrants. The plaintiff in *Luxon* was an enrolled member of the tribe who sought to run for election to the tribal council. The tribal constitution contained a provision barring members of the tribe who worked for the Public Health Service, as did plaintiff, from serving on the council. The District Court had dismissed the case on the grounds urged here—that it lacked jurisdiction to hear cases involving intratribal controversies. The Eighth Circuit reversed and remanded the case for determination of the merits, holding as quoted supra, jurisdiction existed under 28 U.S.C. 1343(4) and 25 U.S.C. 1302(8). The Court then stated:

> "While we determine that the district court has jurisdiction under 28 U.S.C. 1343(4) as set forth above, we express no opinion as to whether or not the facts alleged state a proper cause of action or whether, if true, the plaintiff is entitled to judgment on the merits. These determinations should first be made by the district court. As Mr. Justice Black noted in 1946:
>
> Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction."

> *Bell v. Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946)
>
> *Luxon v. Rosebud Sioux Tribe of South Dakota*, 455 F.2d 698, 700 (8th Cir. 1972).

The decision in *Yellow Bird* virtually ignores this distinction.

The Tenth Circuit recently had occasion to comment on the distinction in *Junior Chamber of Commerce, Rochester, New York v. United States Jaycees, Tulsa, Oklahoma*, 495 F.2d 883 (10th Cir. 1974) cert. den., 419 U.S. 1026, 95 S.Ct. 505, 42 L.Ed.2d 301 (1974). In that case, the New York group and others had been excluded from affiliation with the defendant Oklahoma group because it allowed women members. The New York brought an action in federal district court under 42 U.S.C. 1983, alleging the action of defendants violated their rights under the Fifth and Fourteenth Amendments of the United States Constitution. The trial court granted defendant's motion to dismiss, not for lack of jurisdiction, but for failure to state a claim on the grounds that defendants had failed to show a substantial federal question. The basis for the trial court's decision was in essence that there was insufficient governmental involvement with the organization to subject it to the restrictions of the Fifth and Fourteenth Amendments. On appeal, the Tenth Circuit affirmed the trial court's action, on the basis of *Bell v. Hood*, supra, which it read as mandating dismissal for lack of jurisdiction only if the claim was so insubstantial as to be frivolous, or a mere matter of form, plead solely for the purpose of establishing jurisdiction.

The *Jaycee* case is decisive for the case at bar. The Indian Civil Rights Act is relatively new, and the law concerning its applicability and particularly the effect of the equal protection clause invoked by plaintiffs here is unclear. In view of this and the nature of the claims asserted,

they can hardly be characterized as frivolous or a mere matter of form. This court has jurisdiction to decide the case on the merits.

Defendants filed a second motion to dismiss, contending that the case should be dismissed for lack of jurisdiction in light of *McCurdy v. Steele,* 506 F.2d 653 (10th Cir. 1974). The motion was denied. My previous conclusion still stands.

Briefly, *McCurdy* was a declaratory judgment action concerning the validity of write-in votes under the Constitution of the Goshute Tribe. Plaintiffs, candidates in an election for the tribal council, contended that the votes were not valid, and, therefore, they had won the election. Faced with the questionable write-in votes, the Goshute Election Board had refused to certify any result of the election at all. Plaintiffs had attempted through administrative proceedings to gain recognition of their "election" from the Bureau of Indian Affairs; they were unsuccessful. Contemporaneously, the outgoing Council met and decided a new election should be held. Plaintiffs then filed suit in federal district court. There was, in *McCurdy,* no official tribal position on the question of the validity of write-in votes. Furthermore, as a result of the lawsuit, the second election was never held.

The *McCurdy* case can be viewed in two ways—either as holding that the case presented no justiciable controversy, or as holding tribal remedies and resolutions must be fully exhausted before a federal district court has jurisdiction of a case. Insofar as *McCurdy* is viewed as a justiciability decision, which in my opinion is the correct view in light of the language, the cases are distinguishable, for here there is a clearly expressed, institutionalized tribal position, i.e., the challenged ordinance.

Under the Santa Clara Constitution, the Council has been given both the Legislative and Judicial functions of the Pueblo. In addition, the Constitution, Article II, Section 1,

Subsection (c), specifically gives the Council the power to decide what children of "mixed" marriages shall be recognized as members of the Pueblo. The Council in 1939 chose to exercise that power and adopt the ordinance now under attack. Since then, every Council has chosen to enforce, rather than to amend or repeal that Ordinance. The policy of the Pueblo is clear, and the matter has been resolved by the Pueblo—against the plaintiffs.

The case at bar presents a clear "case or controversy" and there is no barrier to jurisdiction under the doctrine of justiciability.

Defendants argue that *McCurdy* holds that a federal district court will not assume jurisdiction unless plaintiff can show she has exhausted all remedies available to her within the tribe. While I do not agree with such a reading, it is certainly true that other courts have held that a plaintiff must exhaust administrative remedies within the tribe, *Clark v. Land and Forestry Committee of the Cheyenne River Sioux Tribe,* 380 F. Supp 201 (D.S.D. 1974), and have recognized the appropriateness of exhaustion of tribal judicial remedies in some circumstances. *White v. Tribal Council, Red Lake Band of Chippewa Indians,* 383 F.Supp. 810 (D.Minn. 1974) (exhaustion required); *Means v. Wilson,* 383 F.Supp. 378 (D.S.D. 1974) (exhaustion required); *Hickey v. Crow Creek Housing Authority,* 379 F.Supp. 1002 (D.S.D. 1974) (exhaustion required); *O'Neal v. Cheyenne River Sioux Tribe,* 482 F.2d 1140 (8th Cir. 1973) (exhaustion required); *Dodge v. Nakai,* 298 F.Supp. 17 (D.Ariz. 1968) (exhaustion not required in the specific instance). The exhaustion of tribal remedies is not a rigid prerequisite to jurisdiction, however, but is to be decided in the specific circumstances presented, taking into account the practical availability of tribal remedies, *Dodge v. Nakai,* supra, and the demands of tribal autonomy, as against the necessity of immediate action to prevent or redress the deprivation of rights guaranteed by the Indian Civil Rights

Act. *White v. Tribal Council, Red Lake Band of Chippewa Indians,* supra.

For the decision of this case, it will be assumed, without being decided, that exhaustion of remedies within the Pueblo would be required of these plaintiffs on the facts of this case. Even so, as a factual matter plaintiffs have exhausted all remedies reasonably, or even conceivably available to them.

A detailed summary of the efforts of Julia and Audrey Martinez would fill several pages. For the present, a summary of their activities is sufficient.

Julia Martinez first attempted to have Audrey recognized as a member of the Pueblo in 1946, shortly after Audrey was born.[3] Since 1963 her efforts have been vigorous and constant. Julia Martinez has met with her representative to the Council, to request that he present the request tha Audrey be enrolled to the council.[4] When her representative refused to bring the matter up in Council, she obtained special permission from the Governor to address the Council herself. She and other women in her situation have formed a committee which as a group petitioned representatives and, with special permission, the Council. Julia, individually and with the committee, succeeded in having a special meeting of the entire Pueblo convened to discuss the situation. Julia Martinez, individually and with the

[3] Defendants argued that these efforts were undertaken primarily by Julia Martinez, and that Audrey Martinez has never formally petitioned the Council to enroll her, although as she grew older she has participated in Julia's efforts, ignoring the custom and practice of the Pueblo, that a child should be presented for enrollment by her parent, rather than presenting herself.

[4] The By-Laws of the Tribe suggest that individual members of the pueblo may not directly petition the council, but must have their representative present matters to the council for them. Testimony makes it clear that this is and has been the custom of the tribe.

committee of similarly situated women attended meetings with various BIA officials, with the All-Pueblo Agency in Albuquerque. She and her husband Myles attempted to have Myles Martinez naturalized as a member of the Pueblo, in which case their children would have automatically been recognized as members. Mrs. Martinez also met with her State Representative concerning the recognition of her children as members of Santa Clara. Finally Mrs. Martinez attended the hearings held by the Subcommittee on Constitutional Rights of the United States Senate Committee on the Judiciary, where she sought the help of then Senator Sam Ervin, Jr. In most instances there has been more than one attempt to resolve the matter through a particular channel; in particular meetings with the Council representatives, the Governor and the Council have occurred four or five times over the last ten years. Finally, in 1971, Julia and Audrey Martinez sought legal advice. This suit was filed only after attempts by their lawyer to gain recognition for Audrey had failed. Plaintiffs have exhausted all available remedies within the Pueblo.

For the reasons given, I conclude that this Court has jurisdiction of this suit and must proceed to decide the case on its merits.

/s/ Edwin L. Mechem
United States District Judge

(Caption Omitted in Printing)

(Filed June 25, 1975)

Memorandum Opinion

Julia Martinez and her daughter Audrey Martinez bring this suit, each individually and as the representative of a class, against the Santa Clara Pueblo and Governor Lucario Padilla,[1] individually and in his capacity as governor of the Pueblo. plaintiffs claim that a portion of a tribal ordinance which denies Pueblo membership to the children of female but not male members of the Pueblo who marry non-members of the Pueblo, violates 25 U.S.C. § 1302(8), which prohibits a tribal government in the exercise of its powers of self-government from denying "to any persons within its jurisdiction the equal protection of its laws or depriv[ing] any person of liberty or property without due process of law." Plaintiffs seek an injunction against the further enforcement of the ordinance.

The ordinance, passed in 1939, reads as follows:

> Be it ordained by the Council of the Pueblo of Santa Clara, New Mexico, in regular meeting duly assembled, that hereafter the following rules shall govern the admission to membership to the Santa Clara Pueblo:
>
> 1. All children born of marriage between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo.
> 2. All children born of marriages between male members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo.

[1] At the time of trial, Paul Tafoya was the duly elected governor of the Pueblo and was sued individually and in his official capacity. Some time after trial, Lucario Padilla was elected Governor and has been substituted as a defendant pursuant to F.R.C.P. 25(d).

> 3. Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo.
> 4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances.

Plaintiffs attack subparts two and three of the ordinance.

Julia Martinez is a female member of the Santa Clara Pueblo. She is and at all times pertinent to this action was married to Myles Martinez, a Navajo Indian who is not a member of the Pueblo. Plaintiff Audrey Martinez is one of the eight surviving children born to their marriage. Under the 1939 Ordinance, Audrey and the other Martinez children are not recognized as members of the Pueblo. By order previously entered, it has been determined that Audrey Martinez may properly bring this action as the representative of a class consisting of all children born to marriages between Santa Clara women and men who are not members of the Pueblo and that Julia Martinez may properly bring this action as the representatives of a class consisting of all women who are members of the Santa Clara Pueblo, and who have married men who are not members of the Santa Clara Pueblo.

Defendant Santa Clara Pueblo is an Indian tribe which has organized and adopted a constitution under the authority of 25 U.S.C. § 476. Defendant Lucario Padilla is the duly elected Governor of the Pueblo and is responsible for enforcing the laws of Santa Clara. Santa Clara Constitution, Article V; Santa Clara By-Laws, Article 1, Section 1.

Jurisdiction exists over this action under 25 U.S.C. § 1302(8) and 28 U.S.C. § 1343(4). The following memoran-

dum shall constitute the Findings of Fact and Conclusions of Law in this case.[1]

The social and political organization of the Pueblo must be discussed first. Santa Clara Pueblo was founded around 1300 A.D. The Pueblo now covers roughly 48,000 acres, held by the United States in trust for the Pueblo. Approximately 1,200 recognized members and between 150 and 200 non-members currently live on the Pueblo. Approximately 150 recognized members live elsewhere, one-third of them in other locations in New Mexico, and the rest scattered across twenty-two different states.

In its early days, Santa Clara culture made no distinction between what Anglo-Americans would term "political" and "religious" matters. However, with the Spanish invasion in the early seventeenth century, the Pueblo instituted a "secular" government to distract Spanish attention from the *caciques* (religious leaders) who were the real authorities in the Pueblo. The distinction between religious and secular spheres is now well established in the Santa Clara culture.

The membership of the Pueblo is and has been organized into what the anthropologists refer to as "moieties," specifically the Winter people and the Summer people. Each moiety is lead by a cacique, and each is further divided into factions. The precise function and significance of moiety membership is not clear on the record; it is, however, clear that it is primarily a religious grouping. The caciques are still the dominant authorities in the Pueblo, nominating the candidates for secular office and exercising an effective veto by influence over the actions of the secular government.

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[1] A discussion of the Conclusion of Law relating to the existence of jurisdiction is contained in an accompanying memorandum filed contemporaneously with this opinion and incorporated herein by reference.

The division of the moieties into factions is a relatively recent development. During the early part of the twentieth century sharp conflicts developed in the Pueblo over the importance of traditional customs and values in the life of the Pueblo. For example, a major source of controversy was whether the Governor should be an older, highly respected man who was well versed in the traditional ways, or a younger man, educated in Anglo-American schools, who could speak English and would be able to deal more effectively with non-Pueblo society. The disagreement literally split the Pueblo, and during the late 1920s and early 1930s the Pueblo had two governors, neither of whom recognized the authority of the other, and two separate Winter and Summer moieties. The Bureau of Indian Affairs (BIA) staff in Washington offered to arbitrate the dispute. The entire Pueblo agreed that the BIA officials from Washington were irrelevant.

They did agree to have the resident BIA agent, Elizabeth Sargent, help settle the difference. At her suggestion, and after much discussion, the Pueblo organized pursuant to the authority of the Wheeler-Howard Act, 25 U.S.C. § 476, and adopted a Constitution and By-Laws in 1935. As reorganized the secular government retained many of its traditional institutions, such as the unity of the legislative and "appellate" judicial functions in the Council, while at the same time incorporating and instituting certain Anglo-American institutions, principally voting for secular officials. Thus, the present Pueblo government is neither wholly traditional nor wholly anglicized.

Under the Constitution and By-Laws there is a single governing body, the Council, as noted, which possesses both legislative and "appellate" judicial powers. Santa Clara Constitution, Article IV, Sections 1 and 2. The Council consists of the secular officers of the Pueblo—the Governor, the Lieutenant Governor, the Secretary, the Treasurer, the Interpreter, and the Sheriff—and eight representatives.

Santa Clara Constitution, Article III, Sections 1 and 5. As a matter of custom and practice, the representatives represent the factions, which still exist.

The Governor is the chief executive of the Pueblo charged with enforcing the law "civil and criminal, written and unwritten." Santa Clara Constitution, Article V; Santa Clara By-Laws, Article 1, Section 1. In addition he appears to have the initial responsibility for settling controversies among and concerning the members of the Pueblo. A person aggrieved by a ruling of the Governor may appeal to the Council, *Id.*, at which time the Governor may vote only to break a tie. Santa Clara Constitution, Article IV, Section 2.

All other secular governmental power and responsibility is vested in the Council, including the power to enact ordinances governing Pueblo life, Santa Clara Constitution, Article IV, Section 1, Subsection 5. Most important for the present case, the Constitution specifically grants the Council the power to determine which children of mixed marriages shall be recognized as members of the Pueblo, Santa Clara Constitution, Article II, Section 2, and to determine who is a member for purposes of dealings in land and land use rights, Santa Clara Constitution, Article VII, Section 1. The 1939 Ordinance was enacted by the Council pursuant to these powers, and is agreed by all parties to be in force at this time.

The factual development of the equal protection claims of the parties is best begun by identifying the interests of plaintiffs and defendants affected or served by the Ordinance.

As previously noted, Audrey Martinez is the daughter of the marriage of plaintiff Julia Martinez, a recognized member of the Pueblo and Myles Martinez, a non-member of the Pueblo. It is undisputed that the 1939 Ordinance bars recognition of Audrey as a member of the Pueblo. If Myles were a member of the Pueblo and Julia Martinez were not

—or if Julia were not married, and Audrey had been born out of wedlock, the Ordinance would not bar her recognition as a member and the Council would in fact so recognize her.

Julia Martinez has lived at the Pueblo all her life, with the exception of a relatively brief absence to further her education. Myles Martinez has lived at the Pueblo ever since his marriage to Julia, with the exception of a relatively brief absence while serving in the armed forces. Audrey Martinez grew up on the Pueblo, although she does leave to pursue her education. Aside from the fact that she is not recognized as a member of the Pueblo and is therefore denied certain rights, she has been raised in the culture of Santa Clara, speaks Tewa, the traditional language, and clearly considers herself to be a Santa Claran.

As a factual matter, recognition as a member of the Pueblo would give Audrey Martinez three distinct types of rights which she is presently denied. First, she would gain political rights, primarily the right to vote, to take matters before the Pueblo Council, and the qualification to hold office as a secular official. Secondly, she would be entitled to share in the material benefits of Pueblo membership. The most important of the material benefits is that referred to as land use rights. As noted above, title to the Pueblo land is held by the United States in trust for the Pueblo, rather than for the individual members of the Pueblo. The Council may designate specific areas of the land to be set aside for the use of particular individuals, Santa Clara Constitution, Article VII, and members of the Pueblo are equally entitled to use land not specifically assigned to an individual. As a matter of custom and practice, these use rights are passed down through families. However, only members of the Pueblo are entitled to use rights; thus in families such as the Martinez family, where the children are not members of the Pueblo, the land use rights cannot be passed on to succeeding generations. In the

same manner, Article VII, Section 2 of the Santa Clara Constitution, provides that members may rent or sell their use rights, but again, only to other members. As noted above, the Council has the power under the Constitution to determine who is a member for purposes of land use rights. It is undisputed that since 1939 this determination has been governed by the 1939 Ordinance, although from the Constitution it would appear that the Council could, if it so decided, apply different criteria. Other material benefits and privileges include the right to hunt and fish on the land, the use of irrigation water, and an equal share in any distribution of pecuniary benefits made by the Pueblo, or any other programs, present or future, undertaken by the Pueblo for the benefit of its members.

Third, as members, Audrey and other children similarly situated would as of right be able to continue living at the Pueblo. While it is true that the Martinez family and a number of other families in their position live at the Pueblo, this is not as a matter of right. If and when Mrs. Martinez dies, the rest of the family, as non-members, would not have the right to continue living on the Pueblo, though it is not now known whether they would be forced to leave. Furthermore, under the Santa Clara Constitution, Article IV, Section 1, Subsection 5, non-members and only non-members may be expelled from the Pueblo for violating a Pueblo Ordinance.

Lack of membership does not now affect entitlement to federal benefits accorded Indians generally, or participation in the religious life of the Pueblo. In 1968, Mr. and Mrs. Martinez obtained BIA census numbers for their children, and since then the children have received all federal benefits generally available to Indians, including educational and medical benefits. As to religion, Audrey Martinez is already allowed to participate in Pueblo religious ceremonies to the same extent that she would be if she were a recognized member of the Pueblo. Thus, the question presented is one of membership in the Pueblo for purposes of purely internal, secular, rights and privileges.

Julia Martinez claims that the operation of the Ordinance rendering her children non-members denies her the equal protection of the laws and deprives her of property without due process of law. More specifically, she claims that the Ordinance necessarily restricts her land use rights and other material benefits and rights which she could give to her children if they were recognized as members.

In addition to these relatively precise and legally protectible interests, Julia and Audrey Martinez and many of those similarly situated share a strong emotional involvement with the Pueblo. Regardless of official definitions of membership, Julia Martinez feels that her children, having grown up in Santa Clara, should be recognized as Santa Clarans. Audrey Martinez, despite official definitions, clearly considers herself to be a Santa Clara Indian. While the law may not recognize or protect these interests, it would be foolish to pretend that they do not exist.

While the factual context of the legal claims made by Audrey and Julia Martinez differs, it is clear that both ultimately present the same legal question—whether the 1939 Ordinance violates their rights to equal protection of tribal laws, as secured to them by the Indian Civil Rights Act, 25 U.S.C. § 1302(8).

The specific interests of the Pueblo in membership policies generally and in the particular policy of the 1939 Ordinance are of concern as well. Since 1680 the Pueblo has existed as a conquered people, identifiable as a group but surrounded by an alien culture, first Spanish and later American. From a practical political standpoint, the result has been a tension in the life of the Pueblo between traditional Pueblo customs and values and the "modern" customs and values of Anglo-American society. As noted above, this tension was once so acute that the Pueblo be-

came divided against itself. The differences were eventually resolved by the adoption of the Constitution, which drew upon both traditional Pueblo and modern Anglo-American institutions, synthesizing them into a unique structure neither wholly traditional nor wholly modern.

The function of membership policies must be examined within this context. In *Dodge v. Nakai,* 298 F.Supp. 26 (D. Ariz. 1968), the Court dealt with the interest of the Navajo tribe in geographically defining itself, and controlling who could and could not enter the reservation. Membership policies present the same interests on a different level. They are no more or less than a mechanism of social, and to an extent psychological and cultural, self-definition. The importance of this to Santa Clara or to any other Indian tribe cannot be overstressed. In deciding who is and who is not a member, the Pueblo decides what it is that makes its members unique, what distinguishes a Santa Clara Indian from everyone else in the United States. If its ability to do this is limited or restricted by an external authority, then a new definition of what it is to be a Santa Claran is imposed, and the culture of Santa Clara is inevitably changed.

The second major interest served by membership policies, and by the particular policy of the 1939 Ordinance, is that of economic survival of the tribal unit. As plaintiffs have demonstrated, the adoption of the 1939 Ordinance was in response to a sudden increase in mixed marriages, which had resulted in a proportionate strain on the economic resources of the Pueblo. Plaintiffs argue that economic integrity of the Pueblo is less important than cultural autonomy. The difficulty with this position is that the two are not easily separable. The ability of the Pueblo to control the use and distribution of its resources enhances its ability to maintain its cultural autonomy.

Plaintiffs do not challenge the power of the Pueblo, as delegated to and exercised by the Council, to make and en-

force rules concerning membership. Their attack on the Ordinance is solely aimed at the criteria employed as to children of mixed marriages.

At trial the defendants sought to prove that the Ordinance was merely the written embodiment of ancient custom, or alternatively, that the Ordinance regulated membership for religious as well as secular purposes. The Ordinance does not regulate religious as well as political membership. As noted above, Audrey Martinez, although not a recognized member of the Pueblo, is allowed to participate in religious ceremonies to the same extent she would be if she were a member. While there is a relationship between religious life and secular, political life at Santa Clara, the distinction has been clear for nearly four hundred years. The Ordinance neither pertains to religious membership, nor necessarily affects it.

Whether or not the Ordinance is an embodiment of pre-existing ancient Pueblo custom is less clear. Before 1939 mixed marriages were relatively rare in the Pueblo, and consequently there was no need for a hard and fast rule concerning membership; rather, the Council considered each case separately. In that sense, the establishment of any rule must be seen as a break with tradition.

On the other hand, the criteria employed in classifying children of mixed marriage as members or non-members are rooted in certain traditional values. It appears that Santa Clara was traditionally patrilineal and patrilocal—in other words, that kinship, name and location of residence generally were expected to follow the male rather than the female line. These cultural expectations have lost much of their force, but they are not entirely vitiated. The absentee voter lists of the Pueblo show that in 1971, 148 members of the Pueblo lived elsewhere. Of these, 59 were men and 89 were women. In 1973, 143 members lived elsewhere, of whom 59 were men and 84 were women. Furthermore, it is

apparent that membership of the parents and marriage, either within or out of the Pueblo, has always been considered a highly significant factor in membership determinations as opposed to other possible criteria such as degree of Santa Clara ancestry. When a member of the Pueblo married a non-member, the status of children of the marriage was questionable. Consonant with this, children born to an unmarried Santa Clara woman have been and still are recognized as members, regardless of who the father is or might be.

It is clear that the interests of plaintiffs and defendants in the 1939 Ordinance are vitally important. Indeed, they are fundamentally the same. Both sides have political and property rights which are affected by the Ordinance. Both sides also have a deep psychological and cultural interest in the membership Ordinance which, if not legally quantifiable, cannot be ignored.

Basically ". . . Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their Territory, *Worcester v. Georgia*, 6 Pet. [31 U.S.] 515, 557, [8 L.Ed. 483] (1832); they are "a separate people" possessing "the power of regulating their internal and social relations . . ." *United States v. Kagama*, 118 U.S. 375, 381-382 [6 S.Ct. 1109, 30 L.Ed. 228] (1886); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 173 [93 S.Ct. 1257, 36 L.Ed. 2d 129] (1973)." *United States v. Mazurie*, —— U.S. ——, 95 S.Ct. 710, 42 L.Ed. 2d 706, 716, 717 (1975). This sovereign power, however, is subject to limitation by Congress; as a practical matter Indian tribes are sovereign only to the extent Congress has allowed them to remain so. *Worcester v. Georgia*, supra; *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959); *Native American Church of North America v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959); *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965); *Groundhog v. Keeler*, 442 F.2d 674 (10th Cir. 1971); *Seneca Constitutional Rights Or-*

ganization v. George, 348 F.Supp. 51 (W.D.N.Y. 1972); *United States v. Blackfeet Tribe of Blackfeet Indian Reservation*, 364 F.Supp. 192 (D.Mont. 1973); *Lohnes v. Cloud*, 366 F.Supp. 619 (D.N.D. 1973). In the specific instance of membership determinations, it is well settled that Congress may, and in some cases, has made membership determinations for purposes of distribution of tribal property under the control of the United States. *Martinez v. Southern Ute Tribe*, 249 F.2d 915, 920 (10th Cir. 1957) cert.den. 356 U.S. 960, 78 S.Ct. 998, 2 L.Ed.2d 1067, reh. den. 357 U.S. 924, 78 S.Ct. 1374, 2 L.Ed.2d 1376; *Simmons v. Eagle Seelatsee*, 244 F.Supp. 808 (E.D. Wash. S.D. 1965), aff'd 384 U.S. 209, 86 S.Ct. 1459, 16 L.Ed.2d 480. It is equally well settled that, absent Congressional restrictions, an Indian tribe has the power to determine its own membership, at least for purely internal purposes. *Martinez v. Southern Ute Tribe*, supra. Thus, the question presented is to what extent Congress, by enacting 25 U.S.C. § 1302, commonly known as the Indian Civil Rights Act, has exercised its powers of control over membership determinations.

Courts faced with the necessity of contruing 25 U.S.C. § 1302(8) have consistently held that the equal protection guarantee of the Indian Civil Rights Act is not identical to the constitutional guarantee of equal protection. *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079 (8th Cir. 1975); *Daly v. United States*, 483 F.2d 700 (8th Cir. 1973); *Lohnes v. Cloud*, supra; *Groundhog v. Keeler*, supra. Instead, the Act and its equal protection guarantee must be read against the background of tribal sovereignty and interpreted within the context of tribal law and custom. *Crowe v. Eastern Band of Cherokee Indians, Inc.*, 506 F.2d 1231 (4th Cir. 1974); *Means v. Wilson*, 383 F.Supp. 378 (D.S.D. 1974). Unfortunately this principle does not answer questions so much as teach the terms in which they must be asked.

Few courts have been faced with the necessity of deciding specifically what the equal protection clause of the Indian Civil Rights Act means. Although sometimes couched in terms of jurisdictional analysis, it is clear that at a minimum, 25 U.S.C. § 1302(8) requires that existing tribal law be applied with an even hand, rather than being arbitrarily enforced in some cases and not in others, *Crowe v. Eastern Bank of Cherokee Indians, Inc.*, supra; *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, supra; *Laramie v. Nicholson*, 487 F.2d 315 (9th Cir. 1973), cert. den. 419 U.S. 871 (1974); *Yellow Bird v. Oglala Sioux Tribe*, 380 F.Supp. 438 (D.S.D. 1974) (dicta), and that certain aspects of procedural due process principally notice and a hearing, must be observed in granting or denying benefits, *Crowe v. Eastern Band of Cherokee Indians, Inc.*, supra; *Clark v. Land and Forestry Committee of the Cheyenne River Sioux Tribal Council*, 380 F.Supp. 201 (D.S.D. 1974); *Johnson v. Lower Elwha Tribal Community*, 484 F.2d 200 (9th Cir. 1973); see also *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140 (8th Cir. 1973). In addition, it is well settled that blood quantum requirements for membership or office holding are valid classification under the Act, *Daly v. United States*, supra; *Simmons v. Eagle Seelatsee*, supra; despite their highly questionable validity under constitutional standards of equal protection.

On the other hand, there is authority to the effect that where a tribe has departed from traditional methods of choosing tribal officials and adopted Anglo-American voting procedures, the equal protection clause of the Act will incorporate the constitutional equal protection standard of *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), and, if necessary, courts will enforce that standard by ordering reapportionment of tribal voting districts. *White Eagle v. One Feather*, 478 F.2d 1311 (8th Cir. 1973); *Daly v. United States*, supra; *Brown v. United States*, 486 F.2d 658 (8th Cir. 1973); but see *White v. Tribal Council, Red Lake Band of Chippewa Indians*, 383 F.Supp. 810 (D.Minn. 1974). Even in this situation, however, the courts have viewed the matter of reapportionment as an aspect of equal enforcement of already existing tribal law, and have refused to interpret the equal protection clause of 25 U.S.C. § 1302(8) in a manner that would require the enfranchisement of a new class of the tribal population, *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079, 1083 (8th Cir. 1975), on the grounds that such an action would come dangerously close to substituting Anglo-American culture for tribal culture.

In light of the legislative history of the Act, and the interpretations given it thus far, it is clear that 25 U.S.C. § 1302(8) should not be construed in a manner that would invalidate a tribal membership ordinance when the classification attacked is one based on criteria that have been traditionally employed by the tribe in considering membership questions. The 1939 Ordinance does not violate the restrictions of 25 U.S.C. § 1302(8), and plaintiffs have not been denied the equal protection of the laws within the meaning of the Indian Civil Rights Act.

Plaintiffs do not suggest that the Indian Civil Rights Act should be interpreted in a manner which would impose an Anglo-American equal protection standard on tribes in derogation of their traditional values. To the contrary, they have consistently argued, as have the defendants, that the Act should be interpreted in such a manner as to preserve the cultural identity of Indian tribes in general and of Santa Clara in particular. Plaintiffs instead point out that the sex of the parent who is a member of the Pueblo bears little or no relationship to the strength of the parent's identification with traditional Santa Clara culture or the likelihood that the parent will attempt to pass the traditional cultural values on to the child. They point out, quite correctly, that Audrey Martinez and many other children similarly situated have been brought up on the Pueblo,

speak the Tewa language, participate in its life, and are, culturally, for all practical purposes, Santa Clara Indians. On the other hand, there are certainly instances of children whose fathers are members of Santa Clara, but who have been raised far from the Pueblo, who cannot speak the language, who have not participated in the life of the Pueblo, and who know nothing of its values, customs and traditions, yet who are, under the 1939 Ordinance, recognized as members. Plaintiffs contend that this is not only irrational but actively destructive of the cultural identity of the Pueblo.

Even assuming plaintffs are correct, the equal protection guarantee of the Indian Civil Rights Act should not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival and therefore should be preserved and which of them are inimical to cultural survival and should therefore be abrogated. Such a determination should be made by the people of Santa Clara; not only because they can best decide what values are important, but also because they must live with the decision every day. Obviously they can and should be the judges of whether a particular rule is beneficial or inimical to their survival as a distinct cultural group.

Much has been written about tribal sovereignty. If those words have any meaning at all, they must mean that a tribe can make and enforce its decisions without regard to whether an external authority considers those decisions wise. To abrogate tribal decisions, particularly in the delicate area of membership, for whatever "good" reasons, is to destroy cultural identity under the guise of saving it. Congress has not indicated that they intended the Indian Civil Rights Act to be interpreted in such a manner.

Judgment will be entered in accordance with this opinion.

/s/ EDWIN L. MECHEM
United States District Judge

(Caption Omitted in Printing)

(FILED JUNE 25, 1975)

Judgment

This cause having come on for trial, and it having been determined that this cause is properly maintainable as a class action under Federal Rule of Civil Procedure 23(b)(2); that plaintiff Audrey Martinez may maintain this action for herself and as the named representative of the class of all children who are or will be born to marriages between women who are recognized members of the Santa Clara Pueblo and men who are not recognized members of Santa Clara Pueblo; that plaintiff Julia Martinez may maintain this action for herself and as the named representative of the class of all women who are recognized members of the Santa Clara Pueblo and who are married to or will in the future marry men who are not recognized members of Santa Clara Pueblo; and having made Findings of Fact and Conclusions of Law in this case in the form of a Memorandum Opinion and a Supplemental Memorandum Opinion Concerning Jurisdiction, finding the issues in favor of the defendants Santa Clara Pueblo and Governor Lucario Padilla, individually and in his capacity as Governor of the Pueblo, and against plaintiff Audrey Martinez, individually and as the representative of her class, and plaintiff Julia Martinez, individually and as the representative of her class; Now, Therefore,

IT IS ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, entered for the defendants Santa Clara Pueblo and Governor Lucario Padilla, individually and in his capacity as the Governor of the Santa Clara Pueblo, and against plaintiff Audrey Martinez, individually and as representative of her above-described class, and against plaintiff Julia Martinez, individually and as the representative of her above-described class, and that the plaintiffs' cause of action be, and the same hereby is, dismissed.

/s/ EDWIN L. MECHEM
United States District Judge

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 75-1615

JULIA MARTINEZ, on behalf of herself and all others similarly situated, and
AUDREY MARTINEZ, on behalf of herself and all others similarly situated,
Plaintiffs-Appellants,

v.

SANTA CLARA PUEBLO, and LUCARIO PADILLA, individually and as Governor of the Santa Clara Pueblo,
Defendants-Appellees.

ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., et al,
Amici Curiae.

Appeal from the United States District Court for the District of New Mexico
(D. C. No. 9717)

Richard B. Collins, Window Rock, Arizona (Alan R. Taradash and Tim Vollman, Window Rock, Arizona, on the brief), for Plaintiffs-Appellants.

Marc Prelo, Jr., Albuquerque, New Mexico (Richard J. Grodner, Albuquerque, New Mexico, on the brief), for Defendants-Appellees.

Arthur Lazarus, Jr., Washington, D.C., for Amici Curiae, Association on American Indian Affairs, Inc., and The Seneca Nation of Indians of New York.

Marvin J. Sonosky, and Of Counsel: W. Richard West, Jr. for Amicus Curiae, Shoshone Indian Tribe of the Wind River Reservation, Wyoming.

Philip R. Ashby, Albuquerque, New Mexico, and Of Counsel: Richard Schifter, Washington, D. C. for Amicus Curiae, Pueblo of Laguna.

Before BARRETT and DOYLE, *Circuit Judges*, and STANLEY,* *District Judge.*

DOYLE, *Circuit Judge.*

This case draws into question the validity of a membership ordinance of the Santa Clara Pueblo in New Mexico. The challenge is by appellants, on behalf of themselves and others similarly situated. This appellant class is composed of female members of the Pueblo, who are married to non-members, together with their children. Appellees, on the other hand, are the Pueblo and Lucario Padilla, individually and as governor of the Pueblo. The ordinance grants membership in the Pueblo to "[a]ll children born of marriages between male members of the Santa Clara Pueblo and non-members. . . ." It precludes membership for "[c]hildren born of marriages between female membes of the Santa Clara Pueblo and non-members. . . ." Appellants have alleged that the ordinance contravenes the equal protection and due process provisions of the Indian Civil Rights Act of 1968, 25 U.S.C. Section 1302(8).[1] In a trial to the court the decision was in favor of defendants. Martinez v. Santa Clara Pueblo, 405 F. Supp. 5 (D.N.M. 1975).

The subject membership ordinance was enacted on December 15, 1939, in response to a marked increase in marriages between Pueblo members and non-members. Prior to 1930 these had been rare. Prior to the enactment, mem-

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* Of the District of Kansas, sitting by designation.

[1] The statute provides, in pertinent part, that:

No Indian tribe in exercising powers of self-government shall——

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law; • • •.

25 U.S.C. Section 1302(8).

bership in the Pueblo for children of mixed marriages had been determined on an individual basis. In addition, witnesses for the Pueblo testified that there had been several instances, prior to 1939, in which the offspring of female line mixed marriages had been granted membership. The increase in mixed marriages produced concern about the enlarged demands for allocation of land and other tribal resources. The Pueblo's elders were apprehensive that the population increase resulting from intermarriage would strain the Pueblo's finite resources. It was, then, in response to the economic consequences of mixed marriages that the Pueblo Council determined that the offspring of female line mixed marriages would be denied membership while the offspring of male line mixed marriages would be admitted to membership.[2]

Appellant Julia Martinez, whose parents were Santa Clarans, is a member of the Pueblo. Her husband is a full-blooded Navajo and is not a member of the Pueblo. Their eight living children, including appellant Audrey Martinez, are as a result of the ordinance barred from membership in the Pueblo. The Martinezes have lived at the Pueblo con-

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[2] The ordinance is as follows:

Bet it ordained by the Council of the Pueblo of Santa Clara, New Mexico, in regular meeting duly assembled, that hereafter the following rules shall govern the admission to membership to the Santa Clara Pueblo:

1. All children born of marriages between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo.
2. All children born of marriages between male members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo.
3. Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo.
4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances.

Appellants are attacking sub-paragraphs 2 and 3 of the ordinance.

tinuously since their marriage in 1941. All of the Martinez children were reared at the Pueblo; all speak Tewa, the traditional and official language of the Pueblo; all are allowed to practice the traditional religion. In effect, the Martinez children are, culturally, members of the Pueblo.

Since 1946, Ms. Martinez has attempted to enroll her children in the Pueblo through all of the procedures available under the Pueblo government. When her resort to Pueblo remedies proved unavailing, she brought this action.

Appellants have alleged that the ordinance deprives the non-member children of various rights, including residence at the Pueblo as a matter of right; certain political rights, such as voting, holding secular office, bringing matters before the Pueblo council; sharing in the material benefits of Pueblo membership, such as using the land, hunting and fishing. Appellants also contended that the ordinance prevents Ms. Martinez from passing her possessory interest in land [3] on to her children.

The trial court ruled for the Tribe, holding that the ordinance did not violate the Indian Civil Rights Act. Judge Mechem recognized the Pueblo's interest in membership policies generally and in the 1939 ordinance specifically and noted that if the Pueblo's inability to define who is a Santa Claran is limited or restricted, the Pueblo's culture would be changed. He recognized also the legitimacy of the Pueblo's interest in its economic survival and that economic survival and cultural autonomy are interrelated, i.e., economics affects the Pueblo's ability to maintain its cultural

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[3] The Pueblo holds all of the land within the Pueblo's boundaries in fee simple title in common pursuant to an 1858 Act of Congress. 11 Stat. 374; New Mexico v. Aamodt, —— F.2d ——, Nos. 75-1069, 75-1106 (10th Cir. filed June 28, 1976), at 24. Individual members, however, are granted possessory interests in tracts of land which they may pass on to their descendants. The devolution of the possessory interests does not diminish the Pueblo's superior proprietary right.

autonomy and identity. While Judge Mechem found that the ordinance had no bearing on Pueblo religion, he did find that the male-female distinction was "rooted in certain traditional values," 402 F.Supp. at 16—the Pueblo's patrilineal and patrilocal traditions. In assessing the scope of the Indian Civil Rights Act, Judge Mechem found that the scope of the Act's equal protection provision was not coterminous with the constitutional guarantee of equal protection. ". . . [T]he Act and its equal protection guarantee must be read against the background of tribal sovereignty and interpreted within the context of tribal law and custom." *Id.* at 17. He concluded "that 25 U.S.C. Section 1302 (8) should not be construed in a manner that would invalidate a tribal membership ordinance when the classification attacked is one based on criteria that have been traditionally employed by the tribe in considering membership questions." *Id.* at 18, and that, thus, the ordinance did not deny appellants equal protection within the meaning of the Indian Civil Rights Act.

The issues to be considered on this appeal are: one, the sovereign immunity of the Pueblo and whether this court has jurisdiction to entertain the cause; and two, the legal standard applicable to claims of denial of equal protection under the Act. Third, we must decide whether the ordinance conflicts with the Civil Rights Act and, if so, whether the Act is to prevail or must give way to tribal authority.

I.

Whether the Court Has Jurisdiction To Entertain the Cause

The Tribe maintains that sovereign immunity precludes this suit. It also argues that the Indian Civil Rights Act does not furnish jurisdictional basis. We disagree. We have previously considered these arguments and have ruled that jurisdiction exists. Dry Creek Lodge, Inc. v. United States,

515 F.2d 926 (10th Cir. 1975). We also held that to the extent that the Indian Civil Rights Act applies, tribal immunity is thereby limited. Dry Creek Lodge, Inc. v. United States, *supra,* at 934, n.9. On the question of jurisdiction we said that 28 U.S.C. Section 1343(4) which provides for district court jurisdiction over actions brought under "any Act of Congress providing for the protection of civil rights" constituted an appropriate jurisdictional basis for actions under the Indian Civil Rights Act. Dry Creek Lodge, Inc. v. United States, *supra,* at 933, n.6, citing cases. Finally, since this Act of Congress was designed to provide protection against tribal authority, the intention of Congress to allow suits against the tribe was an essential aspect. Otherwise, it would constitute a mere unenforceable declaration of principles.

II.

The Meaning To Be Given to Equal Protection of the Laws as Provided in the Indian Civil Rights Act

A. *Legislative History.*

The Act of Congress in question which is found at 25 U.S.C. Section 1302 undertakes to single out the more important civil rights contained in the Constitution and to render those applicable to tribal members who reside on the reservation. The pertinent portion of the equal protection clause has been, as is apparent from n.1 above, selected as one of the specific protections adopted.[4]

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[4] The Act as it was finally passed, H.R. 2516, Title II (25 U.S.C. Section 1302), reads as follows:

Title I—Rights of Indians

Definitions

Sec. 101. For purposes of this title, the term——

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all

The question is whether Congress intended to make the above clause, as it affects the rights of Indian people in relationship to their tribal governnent, co-extensive with

governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, excluding courts of Indian offenses; and

(3) "Indian court" means any Indian tribal court or court of Indian offense.

Indian Rights

Sec. 102. No Indian tribe in exercising powers of self-government shall——

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

the Federal Constitutional provision (Amendment XIV), which guarantees equal protection to all citizens including Indians. If full constitutional protection is not provided by the Act, to what extent does it furnish protection against discrimination which would under constitutional standards be held invidious and violative?[5]

The Indian Civil Rights Act of 1968 was the product of considerable study, most of which was conducted during 1961-63 by the Subcommittee on Constitutional Rights of the Senate Judiciary Committee (1961-63 Hearings).[6] The authorizing Senate Resolution 53 was broad. It allowed the investigation to extend to "all matters pertaining to civil rights." 107 Cong.Rec. 997 (1961). The Subcommittee carried on a broad inquiry into Indians' constitutional rights in relation to tribal, State, and Federal authority.

The numerous abuses and denials of constitutional rights which were found to exist led to the introduction in 1965 of a series of bills designed to safeguard Indians' constitutional rights. *See* S.Rep. No. 841, 90th Cong., 1st Sess. (1967), pp. 5-6. The bill most pertinent to the case at bar was S.961 which provided that an Indian tribe in exercising its powers of local self-government was subject to the same limitations and restrictions as those which are imposed on the Governments, Federal and State, by the United States Constitution. The broad scope of the hearings is apparent

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

[5] We assume, for the moment, that the discrimination here in question is invidious.

[6] Hearings on Constitutional Rights of the American Indian Before the Subcom. on Constitutional Rights of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess., pt. 1 (1962), 87th Cong., 1st Sess., pt. 2 (1963), 87th Cong., 2d Sess., pt. 3 (1963), and 88th Cong., 1st Sess., pt. 4 (1964).

from the Committee's report.[7] As a result of the testimony taken, the original bill which generally imposed constitutional limitations on Indian tribes was amended so as to specify particular guarantees. *See* n.1, *supra*. This amended bill was reported to the full Senate in S.Rep. No. 841, 90th Cong., 1st Sess. (1967), and it passed unanimously, 113 Cong.Rec. 35471-77 (1967), as S.1843. After that the House of Representatives conducted hearings.[8] Senator Ervin, the bill's chief sponsor in the Senate, became impatient with the slowness of the House of Representatives. He amended S.1843 into the House civil rights bill (H.R. 2516), which was then pending in the Senate. 114 Cong.Rec. 5835-38 (1968). The bill, together with the Indian Civil Rights amendment, passed the Senate. 114 Cong.Rec. 5992 (1968). The House accepted the amendment, 114 Cong.Rec. 9621 (1968), and the measure became law as Title II of the Civil

[7] Hearings on Constitutional Rights of the American Indian, S. 961-68 & S.J. Res. 40, Before the Subcom. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. (1965).

Congressional concern was not limited to extending constitutional protections to Indians in their relations with tribal government. It considered a broad range of measures: S. 962, providing for federal court review of conviction by tribal courts where a constitutional deprivation is alleged; S. 963, authorizing investigation by the Attorney General of all claims of deprivation of constitutional rights by Indians; S. 964, directing the Secretary of the Interior to recommend to Congress a model code governing administration of criminal justice by courts of Indian offenses; S. 965, conferring concurrent jurisdiction on the United States with the States over offenses committed by non-Indians against non-Indians on Indian lands; S. 966, authorizing the States to assume civil and criminal jurisdiction over Indian territory with the consent of the Indians affected; S. 967, certain amendments to the Major Crimes Act; S. 968, expediting approval of certain tribal attorney contracts. The substance of these proposals, with two exceptions, were enacted into law. 114 Cong. Rec. 5835, 5992, 9621 (1968).

[8] Hearings on Rights of Members of Indian Tribes Before the Subcom. on Indian Affairs of the House Comm. on Interior & Insular Affairs, 90th Cong., 2d Sess. (1968).

Rights Act of 1968. The provisions extending these specific rights to Indians are codified at 25 U.S.C. Section 1302.

The congressional hearings gave little attention to constitutional rights other than protection under the criminal law and procedure of individuals in the tribal courts. Also, another area in which the Congress was particularly preoccupied was protecting generally the rights of individual Indians against infringement by tribal government. One proposal brought out in the 1965 hearings on S.961 would have made tribal governments fully subject to all constitutional restraints and requirements, but this was rejected due to the complexity of giving equality in voting rights which might conflict with tribal blood quantum requirements for membership and voting. Also, the First Amendment non-establishment clause, it was pointed out, would endanger the continued existence of Pueblo theocracies. 1965 Hearings 65, 221. But no such limitations were suggested with respect to equal protection which was frequently characterized as a basic or fundamental right among the guarantees. *E.g.*, 1965 Hearings 18, 61.

In response to criticism calling for enumeration of constitutional protections being extended to Indians, *e.g.*, 1965 Hearings 17, 65, 961, the Subcommittee amended the bill in order to delete the non-establishment clause and the Fifteenth Amendment as well as to specify the constitutional guarantees granted from the First and Fourth through Eighth Amendments plus the equal protection guarantee of the Fourteenth Amendment. S.1843; Indian Civil Rights Act of 1968, 25 U.S.C. Section 1302. This furnishes evidence that Congress actually considered the various rights contained in the Bill of Rights and retained those wihch it considered essential and eliminated those parts which it deemed to be out of harmony with Indian culture.

There were conflicting statements regarding refraining from undermining tribal authority. *E.g.*, 1961-63 Hearings

5, 287. But the Subcommittee members stated at the hearings, in Committee reports and in floor debates, their intent to extend broad constitutional protections to individual Indians. Senator Ervin stated that S.961 was intended to insure that individual Indians had the same rights against tribal authorities as other American citizens had under the Constitution. It was pointed out by others that off the reservation Indians had the same rights as other American citizens, but on the reservation their rights depended upon the benevolence of the tribal government. *E.g.*, 1961-63 Hearings, 3, 8, 286, 447; 1965 Hearings, 165, 221.[9] During the floor debate Senator Ervin said that the purpose of the bill was "to confer upon the American Indians the fundamental constitutional rights which belong by right to all Americans." 113 Cong.Rec. 35473 (1967).

The legislative history was not strictly limited to protection of individuals in tribal courts. There was attention given to the guarantee of the exercise of religious freedom. Instances were cited in which there had been deprivations of religious freedom and also there was evidence that actions in United States courts brought to vindicate these violations had failed on the ground that constitutional requirements were inapplicable to tribal governments.[10] This

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[9] The Committee report accompanying S. 1843, S. Rep. No. 841, stated that:

> One of the most serious inadequacies in tribal government arises from its failure to conform to traditional constitutional safeguards which apply to State and Federal Governments. As Senator Anderson, a member of the Committee on Interior and Insular Affairs has noted: "'An Indian citizen has all the rights of other citizens while he is off the reservation, but on the reservation, 'in the absence of federal legislation' he has only the rights given to him by the tribal governing body."

[10] The cases were Toledo v. Pueblo de Jemez, 119 F. Supp. 429 (D.N.M. 1954) (reprisals against Protestants by Pueblo) and Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959) (ban on peyote).

moved the Congress to retain the free exercise of religion among the protections extended to Indians, the adoption of which had the effect of overruling the decisions which had been rendered prior to the enactment of the Indian Bill of Rights. *See* n.10; 1965 Hearings 223; and *see* S.Rep. 841, pp. 7-11.

The legislative history is not free of evidence that Congress considered that in an evaluation such as the present one the cultural autonomy and integrity of the tribes were entitled to be weighed. Thus the deletion of the non-establishment clause and the Fifteenth Amendment appears to have been in deference to the traditional Indian culture. At the same time nothing resembling a formula for determining which of these conflicting interests is to prevail has been furnished.

It is significant that the Pueblos opposed the legislation in question. They regarded it as an effort to import into the tribal government the standards of United States constitutional law. The effect of this would, of course, be to undermine tribal law.

About the only way to resolve this conflict is to recognize the necessity to evaluate and weigh both of these interests. Thus the scope, extent and importance of the tribal interest is to be taken into account. The individual right to fair treatment under the law is likewise to be weighed against the tribal interest by considering the clearness of the guarantee together with the magnitude of the interest generally and as applied to the particular facts. *See* Note: The Indian Bill of Rights and the Constitutional Status of Tribal Governments, 82 Harv.L.Rev. 1343, 1355-60 (1969). The concern of Congress was to protect against serious deprivations of constitutional rights while giving as much effect as the facts would allow to tribal autonomy.

As a result of this comparative weighing, the question which we must answer is whether an ordinance such as

the present one which differentiates between the rights of men and the rights of women and which is clearly subject to subsection (8), the equal protection clause of the Indian Bill of Rights, can be upheld. A study of the legislative history, while it gives some some guides and suggestions, fails to provide a conclusive answer to the ultimate question presented in the case. The legislative proceedings do manifest a congressional intent to recognize the specific guarantee unless the tribal custom or principle outweighs the specific guarantee. In view of at least limited uncertainty, we proceed to a consideration of the positive decision law touching the subject.

B. *Consideration of the Precedents.*

The extent to which the equal protection clause of subsection (8) of the Indian Bill of Rights affords protection to affected persons such as the appellants is a novel question. While the decided cases have taken up and considered the equal protection clause in connection with related problems, no court has come to grips with the issue of discrimination by a tribe against Indian women. And so we ask the question whether a tribe may extend to men members fundamental rights while simultaneously denying the same rights to its women.

There are cases which say that Congress did not intend in enacting the Indian Civil Rights Act to subject a tribe to identical compulsions as those which are exacted under the equal protection clauses of the Fourteenth and Fifth Amendments to the Constitution of the United States.[11]

[11] *See* Howlett v. The Salish and Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976); Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079 (8th Cir. 1975); McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974); Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971); *see also* Note, The Indian Bill of Rights and the Constitutional Status of Tribal Governments, 82 Harv.L.Rev. 1343 (1969).

That is not the same as saying that men can be preferred over women in a substantial way.

One example in which the equal protection standard comes into play but in which the discrimination is less pronounced is in the cases dealing with the quantum of Indian blood as a criterion for tribal membership. Under the Constitution this type of case would constitute a violation. *See for example* Hirabayashi v. United States, 320 U.S. 81 (1943). Courts have, however, had little trouble in upholding these requirements when they have been challenged under the Indian Civil Rights Act. *See* Slattery v. Arapahoe Tribal Council 453 F.2d 278 (10th Cir. 1971), involving the requirement that tribal members possess one-quarter degree Indian blood. There was also the one-quarter requirement in Daly v. United States, 483 F.2d 700 (8th Cir. 1973). One-half degree was upheld for office-holding in the Crow Creek Sioux in the same decision.

The fact that the blood quantum requirement has been sustained furnishes little basis for upholding the discrimination in the case at bar because there is some semblance of basis for the classification. This is in terms of ancestral lines and in maintaining the integrity of the membership. Congress itself has employed these requirements in its definitions and other measures. *E.g.*, 25 U.S.C. Sections 1262, 1300e-1, 3 (1972 laws governing distribution of judgment funds to Indian tribes); Act of June 28, 1898, Section 21, 30 Stat. 495, 502-03 (enrollment criteria for Cherokee Indians).

We have examined the various other areas in which subsection (8) has been applied. Invariably the courts look to the Fourteen h Amendment to the Constitution as a guide. This is true in the election requirement cases both for voting and holding office,[12] in the apportionment of

[12] *E.g.*, Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079 (8th Cir. 1975) (rejecting challenge based in part on purported application of 26th Amendment).

tribal legislatures,[13] residency requirements for voting and holding office,[14] and irregularities in the conduct of an election.[15]

The interest of the Tribe in maintaining its integrity and in retaining its tribal cultures is entitled due consderaton. *See* Means v. Wilson, 522 F.2d 833 (8th Cir. 1975). And where the tribal tradition is deep-seated and the individual injury is relatively insignificant, courts should be and have been reluctant to order the tribal authority to give way. *See* Howlett v. The Salish and Kootenai Tribes, 529 F.2d 333 (9th Cir. 1976).

It is conceded that if the validity of the instant ordinance were to be measured by the Fourteenth Amendment alone, it would have to held violative because it draws its classification lines solely on the basis of sex. The offspring of a mixed marriage in which the woman is a Santa Claran are, by the terms of the ordinance, disqualified from membership in the Pueblo. Where, however, the man is a member of the Santa Clara Pueblo, the offispring of this mixed marriage suffer no such disability. An enactment which works this kind of discrimination violates the equal protection clause of the United States Constitution. Frontiero v. Richardson, 411 U.S. 677 (1973). *See also* Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Weisenfeld, 420 U.S. 636 (1975); Reed v. Reed, 404 U.S. 71 (1971).

The Fourteenth Amendment standards do not, however, apply with full force. They do, nevertheless, serve as a

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[13] *E.g.*, Daly v. United States, 483 F.2d 700 (8th Cir. 1973); White Eagle v. One Feather, 478 F.2d 1311 (8th Cir. 1973) (requiring reapportionment).

[14] *E.g.*, Howlett v. The Salish and Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976); Two Hawk v. Rosebud Sioux Tribe, 404 F. Supp. 1327 (D.S.D. 1975) (upholding residency requirements).

[15] *E.g.*, Means v. Wilson, 522 F.2d 833 (8th Cir. 1975) (setting aside election).

persuasive guide to the decision. The history and decisions teach us that the Indian Bill of Rights is modeled after the Constitution of the United States and is to be interpreted in the light of constitutional law decisions.

But we must still ask: is the Tribe justified in deviating from the Fourteenth Amendment standard on the basis that tribal, cultural and ethnic survival would suffer from full-scale enforcement of subsection (8) to these facts? We must hold that the facts do not support a decision that the Tribe's interest is compelling. The children of Julia and Myles Martinez are 100 percent Indian and 50 percent Santa Claran. They speak the language of the Santa Clara Pueblo, namely, Tewa. They practice the customs of the Tribe and are accepted into the Tribe's religion; nevertheless, they are denied membership and face exclusion with attendant loss of rights of inheritance, residency and voting, together with ability to pass tribal membership to their offspring, solely because their mother rather than their father is a Santa Claran. Compare this with the rights that are accorded the male member of the Santa Clara Pueblo. Even if he marries outside the Pueblo one who is not an Indian, and even though his family resides outside the territory of the Tribe, the offspring are entitled to tribal membership. The Tribe has not shown how such an incongruous and unreasonable result fosters and promotes cultural survival.

The contention is that the culture is patrilineal, patrilocal or patricultural. These, however, are conclusory characterizations. What is the history? The ordinance was passed in 1939 to deal with an unprecedented phenomenon, namely, mixed marriages on a relatively wide scale which resulted from Indians of different tribes meeting and encountering one another in Indian schools. An added element was Indians becoming acquainted while employed off the reservation. They met not only Indians from other tribes, but Anglos as well. Traditionally the Santa Clara female

moved to the house of the Santa Clara husband and undoubtedly the Santa Clara male played a large role in educating the children in the Pueblo's traditions. This is the strongest argument in favor of the Tribe, but it falls short of justifying sex discrimination since there could have been a solution without discrimination. It is important to note also that prior to the adopton of this ordinance the mixed marriage problem was dealt with on an individual case basis. The evidence shows that under this policy there were situations in which the offspring of a Santa Clara woman were admitted to the Pueblo and so historically the 1939 ordinance cannot be said to represent the Santa Clara tradition.

There is evidence that the ordinance was the product of economics and pragmatics. It appeared to the governing body of the Tribe that the offspring of mixed marriages threatened to swell the population of the Pueblo and diminished individual shares of the property. If this were the pressing problem it could have been solved without resorting to discrimination—by simply excluding the offspring of both sexes where the parent, either male or female, married outside the Pueblo.

We do not deny that the power to control and define tribal membership is important in preserving the Tribe's culture and ethnic identity. 402 F. Supp. at 15. Also of great importance is the interest of the individual Indian in tribal membership. His interest extends to living in a particular cultural setting in close relationship with fellow members, inheriting tribal rights, and enjoying federal and other incidental benefits. *See* Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974). If the equal protection clause of the ICRA is to have any consequence, it must operate to ban invidious discrimination of the kind present in this case.

The effect of the ordinance under attack is not to exclude cultural outsiders from the Santa Clara Pueblo. The Mar-

tinez children and many others of the class "have been brought up on the Pueblo, speak the Tewa language, participate in its life, and are for all practical purposes, Santa Clara Indians." 402 F. Supp. at 18. They are persons within the cultural group who have been allowed to develop a substantial stake in the life of the Tribe.

The express term and conditions of subsection (8) purport to guarantee equal justice. Congress could have couched this provision in different terms if it had not intended to enact an effective provision. It did not do so. It is not for us to say that the meaning is unclear or that some other effect was intended. We must conclude that subsection (8) means what it says and that the ordinance is out of harmony with it. The instant tribe policy is of relatively recent origin and so it does not merit the force that would be attributable to a venerable tradition. Also, inasmuch as it originates from practical economic considerations, it becomes an arbitrary and expedient solution to the problem which was then confronting the Tribe. In sum, if we were to approve their ordinance and in turn approve this plain discrimination, it would be tantamount to saying that the Indian Bill of Rights is merely an abstract statement of principle.

The judgment of the district court is reversed and the cause is remanded for further proceedings.